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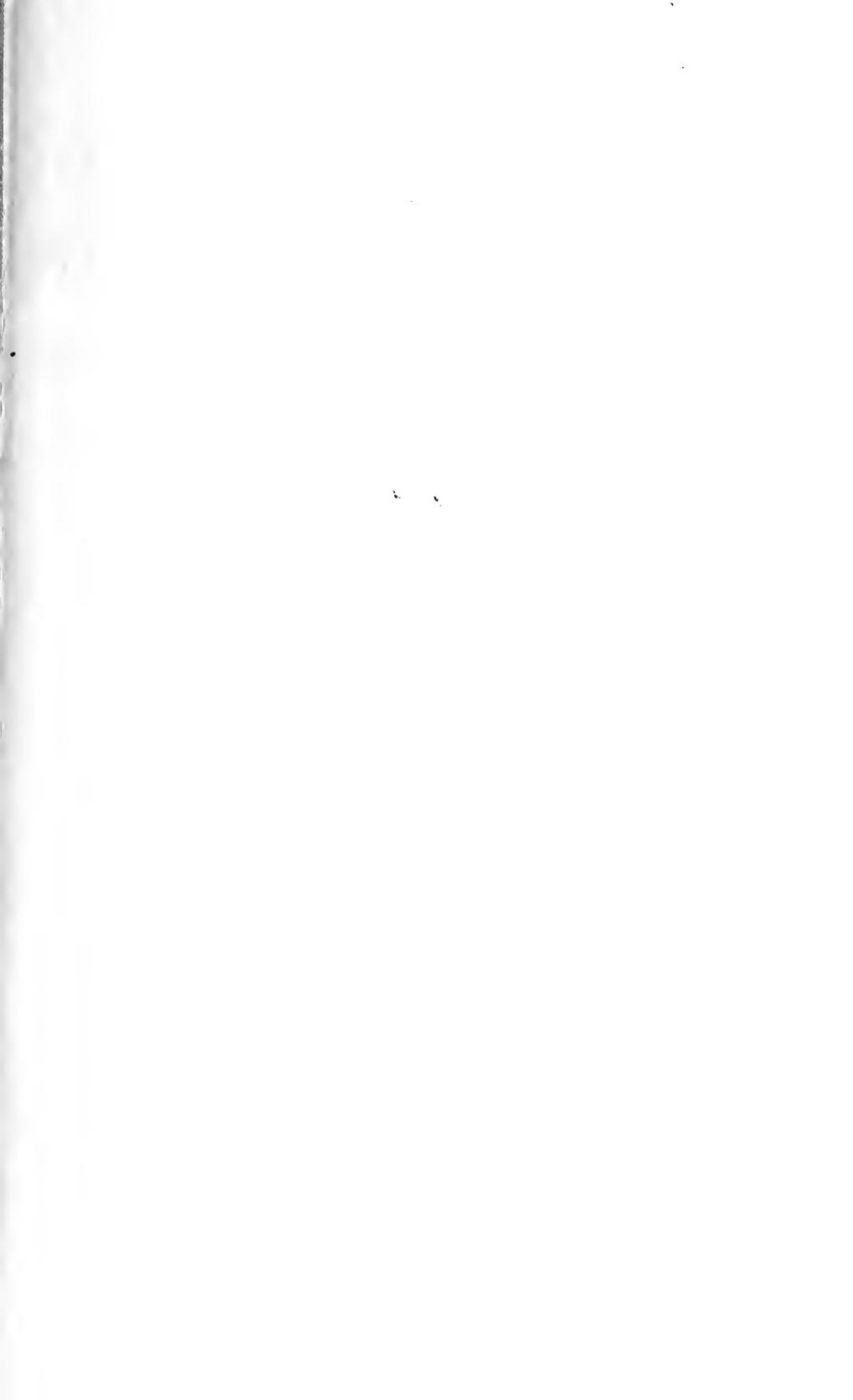
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No. 12197

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United States  
Court of Appeals  
for the Ninth Circuit

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LOUISE HAMILTON,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the Northern District of California,  
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the  
Northern District of California, Northern Division  
vs.

No. 6025

NATIONAL LABOR RELATIONS BOARD,

Applicant,

vs.

LOUISE HAMILTON,

Respondent.

APPLICATION FOR ORDER REQUIRING  
O B E D I E N C E T O S U B P E N A D U C E S  
T E C U M

The National Labor Relations Board, hereinafter referred to as the Board, by its General Counsel, acting through Louis S. Penfield, Chief Law Officer in the Board's Twentieth Region, San Francisco, California, respectfully applies to this Honorable Court, pursuant to Section 11 (2) of the National Labor Relations Act, as amended (Public Law 101—80th Congress, 1st Session, 29 U.S.C.A. § 141, et seq.) (Supp. 1947), hereinafter referred to as the Act, for an order requiring Louise Hamilton, 1527 North "C" Street, Sacramento, California, to obey a subpoena duly served upon her, as set forth herein. In support of said application the Board, upon information and belief, respectfully shows to this Court as follows:

1. This Court has jurisdiction of the matter herein by virtue of Section 11 (2) of the Act, as hereinafter more fully set forth.

2. The Board is an agency of the United States, created pursuant to Section 3 (a) of the Act. A copy of the Act, together with the Board's Rules and Regulations, Series 5, and Statements of Procedure, is attached hereto, marked Exhibit No. 1, parts (a) and (b), respectively, and made a part hereof.

3. Respondent Louise Hamilton is an individual employed as bookkeeper by A. Levy and J. Zentner Co., a California corporation, having a place of business at 1527 N. "C" St., Sacramento, California. The said A. Levy and J. Zentner Co., was, before December 31, 1946, one of several co-partners doing business at Sacramento, California, in the name and style of Rainier Distributing Co. Thereafter, the said A. Levy and J. Zentner Co., did business at the same place in the name and style of Valley Beverage Company and Bell Distributing Company.

4. The Board is empowered by virtue of Section 10 of the Act to prevent any person from engaging in any unfair labor practices within the meaning of Section 8 of the Act which affect or tend to affect commerce within the meaning of Section 2 (6) and (7) of the Act.

5. Upon charges filed pursuant to Section 10 (b) of the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, through the Regional Director of the Twentieth Region of the Board in San Francisco, on April 26, 1948, pursuant to Section 10 (b) of the Act, duly issued a complaint alleging, inter alia, that A. Levy and J. Zentner Co., doing business in the

name and style of Valley Beverage Company, as successor to Rainier Distributing Co., had engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (3), and Section 2 (6) and (7) of the Act. The proceeding in which said complaint was issued bears the Board docket numbers "Case No. 20-C-1570, Case No. 20-C-1571, and Case No. 20-C-1572" and the full title thereof appears in the caption of said complaint, a copy of which is annexed hereto, made a part hereof, and marked Exhibit 2. Said complaint was duly served upon A. Levy and J. Zentner Co., and the said company thereafter filed its answer thereto, in substance denying that it engaged in or is engaging in the unfair labor practices alleged. Pursuant to notice, a hearing on said complaint was begun on June 14, 1948, at Sacramento, California, before a trial examiner of the National Labor Relations Board. On June 23, 1948, the hearing was continued sine die, subject to re-opening upon ten days' notice to the parties.

6. Section 11 (1) of the Act provides that for the purpose of all hearings and investigations which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Sections 9 and 10 of the Act, the Board, or any member thereof, shall, upon application of any party to the proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Section 11 (1) of the Act further provides that within five days after the service of

a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

7. By virtue of Section 203.35 of the Board's Rules and Regulations, issued pursuant to Section 6 of the Act and Section 7 (b) of the Administrative Procedure Act (60 Stat. 237, 5 U.S.C.A. § 1001, et seq. (Supp. 1946)) the trial examiner is authorized, with respect to cases assigned to him, subject to the Rules and Regulations of the Board and within its power, to grant applications for subpoenas and to rule upon petitions to revoke subpoenas. By virtue of Section 203.31 of the Board's Rules and Regulations, the trial examiner is empowered to revoke the subpoena if in his opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity to evidence whose production is required.

8. Section 11 (2) of the Act provides that in the case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person is guilty of contumacy or refusal

to obey is found or resides or transacts business, upon application by the Board, shall have jurisdiction to issue an order requiring such person to appear before the Board, its member, agent, or agency, and to produce evidence if so ordered or to give testimony touching the matter under investigation or in question.

9. At various times between June 14 and June 22, 1948, counsel for the General Counsel of the Board requested A. Levy and J. Zentner Co. to produce by stipulation or competent witnesses evidence respecting the purchases of merchandise in and out of the State of California by the said company while doing business in the name and style of Valley Beverage Company or Bell Distributing Company and concerning its business structure, manner of operation and personnel from January 1, 1947, to the present time. A. Levy and J. Zentner Co. refused fully to comply with such requests.

10. On June 23, 1948, a subpoena duces tecum duly issued, pursuant to Section 11 (1) of the Act, by John M. Houston, a member of the Board, and directed to respondent Louise Hamilton, to appear before a trial examiner of the Board on the 28th day of June, 1948, or sooner, at 10:00 a.m., and then and there to produce various documentary data as therein described, and to testify, was duly served upon respondent Louise Hamilton. A copy of the said subpoena duces tecum, with affidavit of service, is hereto annexed, marked Exhibit 3, and made a part hereof. On June 23, 1948, respondent Louise Hamilton appeared at the hearing before the

trial examiner of the Board and filed her Special Appearance By Motion to Quash Subpenea and Petition to Revoke Subpenea, a copy of which is hereto annexed, marked Exhibit 4, and made a part hereof. The trial examiner denied the said motion to quash Subpenea and Petition to Revoke subpenea.

11. Respondent Louise Hamilton, upon advice of her counsel, then failed and refused and is continuing to fail and refuse to testify or to produce the books, records, and documents as called for in the subpenea duces tecum.

12. The books, records and documents called for in the subpenea duces tecum are relevant, material and necessary in the aforementioned proceeding before the Board and relate to the matters under investigation and in question before the Board, in that the same bear upon whether or not the operations of A. Levy and J. Zentner Co., doing business as Valley Beverage Company or Bell Distributing Company affect commerce and whether or not A. Levy and J. Zentner Co., doing business as Valley Beverage Company or Bell Distributing Company is a successor to the co-partnership which formerly did business as Rainier Distributing Company. It is desired by the Board's agents to question respondent Louise Hamilton, as bookkeeper for A. Levy and J. Zentner Co., concerning the identity and subject matter of the documents required to be produced by the subpenea duces tecum concerning the business operations, structure and personnel of A. Levy and J. Zentner Co., and concerning the effect of such operations on commerce within the meaning of Sections 2 (6) and (7) of the Act.

13. Counsel for both A. Levy and J. Zentner Co., and respondent Louise Hamilton agree and acknowledge that respondent Louise Hamilton is a competent witness who has the ability to produce the evidence described in the subpoena duces tecum.

14. The refusal of said respondent Louise Hamilton to obey the subpoena duces tecum has impeded and continues to impede the Board in the investigation of the aforesaid matters and in the conduct of the hearing upon the aforesaid complaint and in the performance of its duties under the Act.

Wherefore, the applicant, the National Labor Relations Board, respectfully prays:

(a) that an Order to Show Cause be issued forthwith directing the respondent, Louise Hamilton, to appear before this Court on a day certain to be fixed in the Order, and show cause, if there be any, why an order of this Court should not issue directing Louise Hamilton to appear before the Board's Trial Examiner, at such time and place as this Court may order and there produce the books, records, and documents described in the aforementioned subpoena duces tecum and to testify as described in the aforesaid subpoena duces tecum.

(b) that upon the return of said Order to Show Cause, an order issue requiring respondent Louise Hamilton to appear before the Trial Examiner of the National Labor Relations Board at such time and place as the Court may order and there to produce the books, records and documents described in the aforementioned subpoena duces tecum and to

testify and give evidence as required by the subpoena duces tecum.

(c) that the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated at San Francisco, Calif., this 29th day of July, 1948.

NATIONAL LABOR RELATIONS  
BOARD.

By /s/ LOUIS S. PENFIELD,  
Chief Law Officer, Twentieth Region, San Francisco,  
California.

State of California,  
City and County of San Francisco—ss.

I, Louis S. Penfield, being first duly sworn, depose and say that I am Chief Law Officer for the Twentieth Region, National Labor Relations Board, that I have read the foregoing petition and know the contents thereof, and that the statements therein upon personal knowledge are true and those upon information and belief, I believe to be true.

/s/ LOUIS S. PENFIELD,  
Chief Law Officer, 20th Region, National Labor Relations Board, San Francisco, California.

Subscribed and sworn to before me this 29th day of July, 1948.

[Seal]      /s/ HENRY B. LISTER,  
Notary Public.

EXHIBIT No. 4

United States of America Before the National Labor  
Relations Board, Twentieth Region

Case No. 20-C-1572, 20-C-1571, 20-C-1570

In the Matter of ALFRED A. BAROSSO, ANDREW W. WILLI, JOSEPH W. BOWMAN, WILLIAM A. HARTFORD, and A. LEVY and J. ZENTNER CO., co-partners, d/b/a RAINIER DISTRIBUTING CO., and A. LEVY and J. ZENTNER CO., d/b/a VALLEY BEVERAGE COMPANY, as successor to RAINIER DISTRIBUTING CO.,

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL AND SOFT DRINK WORKERS OF AMERICA, LOCAL 227, CIO.

SPECIAL APPEARANCE BY MOTION TO QUASH SUBPOENA AND PETITION TO REVOKE SUBPOENA

Now comes Louise Hamilton and appears specially before the trial Examiner, C. W. Wittemore, of the National Labor Relations Board, for the purpose of moving to quash and petitioning to revoke the purported process described as a subpoena of the National Labor Relations Board, No. B 8870, which appears to have been issued on or before June 23rd, 1948, in the above-entitled matter, and as grounds for this motion and petition states:

I. That the National Labor Relations Board is

without authority or jurisdiction to act or proceed in this matter for the following reasons:

(a) That the purported complaint in this matter (General Counsel's Exhibit No. (d) is predicated upon so-called "second amended charges" (General Counsel Exhibits No. 1A, 1B, and 1C), dated January 24th, 1948, and charging unfair labor practices allegedly occurring in the months of July and August, 1946.

(b) That there is no contention or evidence in this proceeding of service of these so-called charges upon any of the persons sought to be charged at any time prior to February 12th, 1948.

(c) That these so-called charges show upon their face that they do not contain the matters required by Section 203.12 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 27th, 1947, and in effect continuously thereafter, and in particular the matters required by subsections (b), (e) and (f) of Section 203.12.

(d) That the purported complaint is dated April 26th, 1948, and alleges unfair labor practices occurring in the months of July and August, 1946, and is without allegations of the jurisdictional matters required by Sections 9 (f), (g), and (h) and 10 (b) of the Act, to-wit:

- (1) That charges were filed;
- (2) That charges were served;
- (3) That charges were served within six months of the alleged unfair labor practices;
- (4) That if not filed in time the charging party or person aggrieved was prevented from doing so

by the reason of service in the armed forces of the United States.

(b) That the charging union and any national or international union with which it is affiliated has filed the documents, and reports required by Section 9 (h) of the Act and Rule 203.13 of the Board.

(e) That no evidence has been offered or adduced in these proceedings, and the representative of the General Counsel has stated in these proceedings that no evidence will be offered or adduced by him or on his behalf, as to any of the matters and things set forth herein in (d) (1) (2) (3), (4), (5) and (6).

(f) That the Trial Examiner in these proceedings has continuously refused and does now refuse to permit respondents to interrogate witnesses produced by the representative of the General Counsel in these proceedings as to any of the matters or things required by Section 9 (h) of the Act, and by Rules 203.12 (e), (f) and 203.13 upon the ground that questions so directed are incompetent, irrelevant, and immaterial to the issues in this matter.

II. That by acting or proceeding in this matter the National Labor Relations Board is denying respondents due process of law in contravention of the Fifth Amendment to the Constitution of the United States for the following reasons:

(a) That this matter has been initiated and is being prosecuted upon an unidentified document received in evidence over objections of respondents which purports to be a complaint issued by a Regional Director of the National Labor Relations Board without any proof or evidence that the same

was ever issued and without any evidence that the same was issued or that these proceedings are had in conformity with Sections 10 (b) and 9 (f), (g) and (h) of the Act; although the same bears the date of April 26, 1948.

(b) That said purported complaint alleges none of the jurisdictional requisites set forth in I (d), above, and the so-called "second amended charges," dated January 24th, 1948, (General Counsel's Exhibits No. 1A, 1B and 1C) show upon their face that they do not contain the matters required by Section 203-12 of the Rules and Regulations of the National Labor Relations Board, Series 5, effective August 27th, 1947, and in effect continuously thereafter, and in particular the matters required by subsections (b), (e), and (f) of Section 203.12.

(c) That no evidence has been offered or received in this proceeding that the purported complaint was issued or that these proceedings follow compliance with Section 10 (b) of the Act and Section 9 (f), (g) and (h) of the Act.

III. That no complaint has issued herein.

Dated at Sacramento, California, June 23rd, 1948.

Respectfully submitted,

/s/ ANTHONY J. KENNEDY,  
/s/ CARL KUCHMAN,  
/s/ GILFORD G. ROWLAND,  
/s/ RICHARD ERNST,

Counsel for Louise Hamilton.

[Endorsed]: Filed July 29, 1948.

[Title of District Court and Cause.]

**RETURN TO ORDER TO SHOW CAUSE AND  
ANSWER TO APPLICATION FOR ORDER**

Louise Hamilton, respondent in the above-entitled matter, herewith files her return to order to show cause and her answer to the application for order requiring obedience to subpoena duces tecum and admits, denies and alleges as follows:

**I.**

Respondent denies the allegations of Paragraph 1 of the application for order and alleges the fact to be that if this Court has jurisdiction it has such by virtue of Section 11 (2) of the National Labor Relations Act, as amended (Public Law 101, 80th Congress, First Session, 29 U.S.C.A., Paragraph 141, et seq.) (Supp. 1947), hereinafter referred to as "the Act." Such jurisdiction is limited to enforcing obedience to only those subpoenas as are duly and regularly issued by the National Labor Relations Board in a matter in which the said Board has jurisdiction. Respondent denies that in the matter herein concerned the said Board has jurisdiction to hear the matter, as is more particularly hereinafter alleged.

**II.**

Respondent admits the allegations contained in the first and second sentences of Paragraph 3 of the application. As to the allegations of the third and last sentence of said paragraph, respondent admits that A. Levy and J. Zentner Co. did business at the same and other places under the names and

styles alleged, but denies that it did business in said place or at any other place as successor to the Rainier Distributing Co. and denies that it operated any business previously operated by the Rainier Distributing Co.

### III.

Respondent denies the allegations of Paragraph 4 of the said application and alleges the fact to be:

(a) that under Section 10 of the Act, the Board is empowered to prevent any person from engaging in certain unfair labor practices affecting commerce, but only in those cases in which the said Act authorizes and empowers the Board to act;

(b) that the said Board does not have jurisdiction to issue a complaint based upon any alleged unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom the charge is made, unless the aggrieved party was prevented from filing the charge by reason of service in the armed forces, in which event the six-months' period is computed from the date of discharge;

(c) that the said Board does not have jurisdiction to issue a complaint upon any charge made by a labor organization, unless the officers of both said labor organization and of any national or international labor organization of which it is an affiliate or constituent unit, have filed the affidavits as provided by Section 9(h) of said Act and the said labor organizations have themselves complied with Section 9(f) and (g); and

(d) that said Board does not have jurisdiction

to conduct a hearing on any complaint which it does not have jurisdiction to issue; and

(e) Respondent further alleges that to enforce the subpoena described in the application or to compel the respondent to give any testimony in National Labor Relations Board Case No. 20-C-1570, 1571, 1572 would be in violation of law and in violation of the Fourth and Fifth Amendments to the Constitution of the United States and would deny the respondent her constitutional rights under those amendments and would deny the right of the respondents in the proceeding before the National Labor Relations Board to due process of law.

#### IV.

Respondent denies the allegations of Paragraph 5 of said application and denies that the document entitled "Complaint" attached to the application and marked Exhibit 2 thereof is a true and correct copy of the alleged complaint issued by said Board, and alleges the true facts to be:

(a) That a labor organization known as Local 227 affiliated with the national labor organization known as the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, filed with the said Board documents denominated "Second Amended Charge," dated January 26, 1948, copies of which documents are a part of respondent's Exhibit A attached hereto, and no one of said documents is a charge because it does not comply with the provisions of Section 10(b) of the Act and does not comply with the provisions of Sections 203.12 and 203.13, Series 5, Rules and

Regulations of the National Labor Relations Board; and that said documents alleged that certain acts occurring on or about July 30 to August 5, 1946, were unfair labor practices;

(b) that upon the basis of said documents denominated "Second Amended Charge," a document, dated April 26, 1948, was issued entitled "Complaint" which in words and figures is identical with the last 8 pages of respondent's Exhibit A, which is attached hereto and made a part hereof; and that said document alleged that certain acts occurring on or about July 30 to August 5, 1946, were unfair labor practices;

(c) That on or about April 30, 1948, A. Levy and J. Zentner Co. received by registered mail a copy of a document consisting of nine pages, which was bound together by a metal staple and which in words and figures is identical with Exhibit A attached hereto and made a part hereof;

(d) that thereafter A. Levy and J. Zentner Co. filed its Answer to said document entitled "Complaint"; and that pursuant to notice, a hearing on the said purported complaint was begun on June 14, 1948, at Sacramento, California, before a trial examiner of the National Labor Relations Board; and that on June 23, 1948, the hearing was continued sine die, subject to reopening upon ten days' notice to the parties after final determination of any proceeding in the Federal Courts for the enforcement of the said subpoena.

## V.

Respondent denies the allegations of Paragraphs 6, 7 and 8 of the said application and alleges the

true facts to be that the sections of the Act and the Rules and Regulations of the Board referred to therein are correctly set forth respectively in Exhibit No. 1, Part (a) and Exhibit No. 1, Part (b), attached to the said application.

## VI.

Respondent denies the allegations of Paragraph 10 of the said application and alleges the true facts to be that on June 23, 1948, a subpoena duces tecum was issued by the Board member named in said Paragraph 10 and directed to respondent, requiring her to appear at the time and place specified in said paragraph 10; and further alleges that said subpoena was issued to compel the attendance of respondent at the purported hearing being conducted before a trial examiner of said Board in a matter of which the said Board had no jurisdiction as herein alleged; and that respondent did specially appear at the said purported hearing and did file her special appearance by motion to quash subpoena and petition to revoke subpoena, a true and correct copy of which is annexed to the application and marked Exhibit No. 4; and that said motion and petition was denied by the trial examiner.

## VII.

Respondent denies the allegations of Paragraph 11 of the said application and alleges the true facts to be that the said respondent, upon advice of counsel, refused to be sworn or to testify or to produce the books, records, and documents as called for in the subpoena duces tecum.

### VIII.

Respondent denies the allegations of Paragraph 12 of the said application and alleges the true facts to be:

(a) That the evidence, both oral and documentary, sought to be secured from respondent through said subpoena would be material and competent evidence if the Board had jurisdiction to conduct the hearing in the course of which said subpoena was issued and alleges that there is a clear and affirmative lack of jurisdiction of the Board in the said proceeding;

(b) That the said subpoena was issued in the course of the hearing in Case No. 20-C-1570, 1571, 1572 and with respect to the alleged unfair labor practices set forth in respondent's Exhibit A and is with respect to no other hearing or investigation of the said Board.

### IX.

Respondent denies the allegations of Paragraph 13 of said application and alleges the true facts to be that counsel for A. Levy and J. Zentner Co. and for respondent acknowledge that respondent Louise Hamilton would be a competent witness who has the ability to produce the evidence described in the subpoena duces tecum if the Board had jurisdiction of the matter upon which it was seeking to conduct a hearing; and alleges that the Board is entirely without jurisdiction of the said matter, as herein alleged.

### X.

Respondent denies the allegations of Paragraph 14 and alleges the true facts to be that the said

subpoena was issued by the Board in the course of a formal proceeding under Section 10(b) of the Act upon the formal papers in respondent's Exhibit A, which said proceeding is clearly and affirmatively outside of the jurisdiction of the Board, and that the refusal to comply with such subpoena in no way impedes the performance of any lawful duty of the Board.

As a Further and Separate Defense, respondent alleges:

#### XI.

The affirmative allegations of Paragraphs I, IV, VI and VII hereof are incorporated herein as if set forth at length.

#### XII.

Said subpoena was issued by the Board in the course of its formal proceeding—Case No. 20-C-1570, 1571, 1572—under Section 10(b) of the Act upon the formal papers in respondent's Exhibit A and solely to compel the production of evidence at the hearing in said proceeding.

#### XIII.

Upon the face of the formal documents before the Board in said proceeding—its Case No. 20-C-1570, 1571, 1572—it clearly and affirmatively appears that all action of the Board in that case is wholly outside its jurisdiction and that it has no possible statutory authority to proceed in such case—in the following particulars:

(a) The proceeding in said case is with respect to acts, alleged to be unfair labor practices, that occurred on or about July 30 to August 5, 1946, and on a document purported to be a charge filed

by a labor organization and dated January 26, 1948;

(b) The said proceeding is with respect to acts, alleged to be unfair labor practices, that occurred before September 15, 1946, and with respect to which no charge was served until long after June 23, 1947, although no aggrieved party was prevented from filing any charge with respect to such alleged unfair labor practices by reason of service in the armed forces;

(c) The documents purported to be the charges of unfair labor practices on which said proceeding is based are not "charges" because they do not satisfy the requirements of Section 10 of the Act and Sections 203.12 and 203.13, Series 5, Rules and Regulations of the National Labor Relations Board upon the basis of which the purported complaint assertedly was issued;

(d) The purported complaint contains no allegation that each officer of the charging union, Local 227, International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, has filed an affidavit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. In fact, affidavits of each such officer were not on file when the said purported complaint was issued;

(e) The purported complaint fails to state when,

if ever, the charges of unfair labor practices were filed by said International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227;

(f) The purported complaint fails to allege that any charge of the unfair labor practices upon which said purported complaint is based was, within six months of the occurrence of said alleged unfair labor practice, served upon the person against whom such charge was made, or was served at all. In fact, the "Second Amended Charge," in Case No. 20-C-1572, copy of which is part of the purported complaint, was not served until after February 10, 1948, and no charge of any of the alleged unfair labor practices involved in the purported complaint was served until after July 1, 1947.

#### XIV.

The record before this court shows without contradiction that all action of the Labor Board in said proceeding—its Case No. 20-C-1570, 1571, 1572—is wholly outside its jurisdiction and that it has no possible statutory authority to proceed in such case—in the following particulars:

(a) The fact of the complete absence of jurisdiction of the Board was seasonably raised by respondents and intervenors at the beginning of the hearing in said proceeding and throughout its continuance;

(b) The particulars set forth in subparagraphs (a) through (f) inclusive of Paragraph XII are incorporated herein as if set forth at length;

(c) Throughout the proceeding the General

Counsel of the Board consistently took the position and maintained that proof would not be submitted, and that proof is not required, that there are on file with the Board the affidavits required, under Section 9(h) of the Act, to give jurisdiction to issue a complaint on the basis of the purported charge filed by said Local 227;

(d) Throughout the said proceeding the General Counsel maintained that the existence or non-existence of such affidavits is a purely administrative fact open only to the General Counsel of the Board and may not be litigated before the Board or otherwise and that such fact may not be inquired into by employers, unions or any other interested person;

(e) There is not on file with the Board an affidavit of each officer of the charging labor organization, Local 227, stating the facts required, under Section 9(h) of the Act, to give jurisdiction to issue a complaint on the basis of any charge filed by said labor organization.

As part of this return of the respondent before this court, there are attached hereto, as respondent's Exhibit B, true and correct copies of excerpts from the official transcript of the proceeding in Case No. 20-C-1570, 1571, 1572.

## XV.

Respondent further alleges that to enforce the subpoena described in the application or to compel the respondent to give any testimony in the hearing in National Labor Relations Board Case No. 20-C-1570, 1571, 1572 would be in violation of law and

in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and would deny the respondent her constitutional rights under the amendment, and would deny due process of law to the respondents in said proceeding of the Board.

Dated: San Francisco, August 24, 1948.

/s/ ANTHONY J. KENNEDY,  
/s/ GILFORD G. ROWLAND,  
/s/ CARL KUCHMAN,  
/s/ RICHARD ERNST,

Attorneys for Respondent.

State of California,  
City and County of San Francisco—ss.

Richard Ernst, being first duly sworn, deposes and says:

That he is one of the attorneys for the respondent in the above-named proceeding; that he has read the said Return to Order to Show Cause and Answer to Application for Order and knows the contents thereof; and that the same is true of his own knowledge except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

/s/ RICHARD ERNST.

Subscribed and sworn to before me this 24th day of August, 1948.

[Seal] /s/ EUGENE P. JONES,  
Notary Public in and for the City and County of  
San Francisco, State of California.

## EXHIBIT A

United States of America Before the National Labor  
Relations Board, Twentieth Region

Case No. 20-C-1570, 20-C-1571, 20-C-1572

In the Matter of E. A. SPARKS, d/b/a ACME BEVERAGE COMPANY, GEORGE F. GOTTMANN, d/b/a STERLING BRANDS, ALFRED A. BAROSSO, ANDREW W. WILLI, JOSEPH W. BOWMAN, WILLIAM A. HARTFORD, and A. LEVY and J. ZENTNER CO., co-partners, d/b/a RAINIER DISTRIBUTING CO., and A. LEVY and J. ZENTNER CO., d/b/a VALLEY BEVERAGE COMPANY, as successor to RAINIER DISTRIBUTING CO.,

and

INTERNATIONAL UNION OF UNITED BREWERY, FLOUR, CEREAL AND SOFT DRINK WORKERS OF AMERICA, LOCAL 227, CIO.

ORDER CONSOLIDATING CASES AND  
NOTICE OF CONSOLIDATED HEARING

Charges, pursuant to Section 10(a) of the National Labor Relations Act, as amended, (June 23, 1947, Public Law 101, 80th Congress; Chapter 120—First Session) having been filed in the above-entitled cases by International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Local 227, affiliated with the Congress of

Industrial Organizations, and the undersigned having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay,

It Is Hereby Ordered, pursuant to Section 203.33 (b) of the National Labor Relations Board Rules and Regulations—Series 5, that these cases be, and they hereby are consolidated.

You Are Hereby Notified that, pursuant to Section 10(b) of the Act, on the 10th day of May, 1948, at Sacramento, California, in the Supervisors' Chambers of the County Court House, 7th and I Streets, 10 a.m., a hearing will be conducted before a Trial Examiner of the National Labor Relations Board upon the allegations set forth in the Complaint attached hereto, at which time and place the parties will have the right to appear in person or otherwise, and give testimony.

In Witness Whereof, the General Counsel of the National Labor Relations Board on behalf of the Board, has caused this Order Consolidating Cases and Notice of Consolidated Hearing to be signed by the Regional Director for the Twentieth Region on this 26th day of April, 1948.

/s/ GERALD A. BROWN,  
Regional Director, National Labor Relations Board,  
407 Federal Office Building, San Francisco, California.

United States of America Before the National Labor  
Relations Board, Twentieth Region.

[Title of Causes Nos. 20-C-1570-71-72.]

**COMPLAINT**

It having been charged by International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, Local 227, affiliated with the Congress of Industrial Organizations, that E. A. Sparks, d/b/a Acme Beverage Company, herein called Respondent Sparks; George F. Gothmann, d/b/a Sterling Brands, herein called Respondent Gothmann; and Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners, d/b/a Rainier Distributing Co., and A. Levy and J. Zentner Co., d/b/a Valley Beverage Company, as successors to Rainier Distributing Co., herein collectively called the Respondents Rainier, have engaged in and are now engaging in certain unfair labor practices affecting commerce, as set forth in the National Labor Relations Act, as amended, herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Board's Rules and Regulations, Series 5, Section 203.15, hereby issues his complaint and alleges as follows:

**I.**

A. Respondent Sparks is now and at all times hereinafter mentioned has been an individual engaged through his place of business at Sacramento, California, in the distribution of malt beverages, wine and candy.

B. Respondent Gothmann is now and at all times hereinafter mentioned has been an individual engaged through his place of business at Sacramento, California, in the distribution of malt beverages and wine.

C. At all times hereinafter mentioned before December 31, 1946, Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., a California corporation, were co-partners, doing business in the name and style of Rainier Distributing Co. They engaged, through their place of business at Sacramento, California, in the distribution of malt beverages and wine. On or about December 31, 1946, A. Levy and J. Zentner Co., purchased the assets of the above-described co-partnership and has since, under the name of Valley Beverage Company, continued, as successor to the said co-partnership, to operate the business formerly engaged in by it.

## II.

The respondents named above, in the course and conduct of their business operations, caused and have continuously caused substantial amounts of materials to be purchased, delivered and transported in interstate commerce from and through states of the United States other than the State of California.

## III.

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, affiliated with the American Federation of Labor,

herein called the Teamsters, is and at all times hereinafter mentioned has been, a labor organization within the meaning of Section 2(5) of the Act.

#### IV.

The respondents, by their respective officers and agents, while engaged in the operations described above, laid-off the employees named below on or about the dates set opposite their names and thereafter refused to employ them unless or until they affiliated with or obtained clearance from the Teamsters:

##### By Respondent Sparks

Raphael Anderegg, July 30, 1946.  
Archie P. Cope, July 30, 1946.  
Albert Kozlosky, July 30, 1946.  
Theodore G. Parks, July 30, 1946.  
Manuel Machado, July 30, 1946.  
Victor Stassi, July 30, 1946.

##### By Respondent Gothmann

Edgar Main, Jr., August 1, 1946.  
Arnold Bird, August 1, 1946.  
William Booth, August 1, 1946.  
John Gonsalves, August 1, 1946.  
Charles W. Follett, August 1, 1946.  
Clarence Kulil, August 1, 1946.  
Leo Kozlosky, August 1, 1946.  
John L. Huston, August 1, 1946.  
Lynn Matteson, August 1, 1946.  
Angelo D'Agostino, August 1, 1946.  
Emmet McCauley, August 1, 1946.

## By Respondents Rainier

Alfred Costanzo, August 5, 1946.

W. E. Beagle, August 5, 1946.

Tom J. Enos, August 5, 1946.

Vernon Beagle, August 5, 1946.

Gilbert Kozlosky, August 5, 1946.

Mike Matievich, August 5, 1946.

Oscar Matranga, August 5, 1946.

Ernest Bowles, August 5, 1946.

George P. Wolff, August 5, 1946.

## V.

The respondents, by their officers and agents, while engaged in their operations described above, did, from on or about July 28, 1946, until August 26, 1946, inform their employees that they could not continue their employment unless they affiliated with or obtained clearance from the Teamsters.

## VI.

By their acts set forth in paragraph IV, above, each of the respondents discriminated and is discriminating in regard to hire or tenure of employment or terms or conditions of employment of its employees named in said paragraph, and encouraged membership in a labor organization and thereby engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (3) of the Act.

## VII.

By their acts set forth in paragraphs IV and V, above, each of the respondents interferred with,

restrained, and coerced, and is interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed to them in Section 7 of the Act, and did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8(a) (1) of the Act.

### VIII.

The acts of the respondents set forth in paragraphs IV and V, above, occurring in connection with the operations of the respondents described in paragraphs I and II, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

### IX.

The aforesaid acts of the respondents set forth in paragraphs IV and V, above, and each of them, constitute unfair labor practices within the meaning of Section 8(a)(1) and (3), and Section 2, (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 26th day of April, 1948, issues his Complaint against E. A. Sparks, d/b/a Acme Beverage Company; George F. Gothmann, d/b/a Sterling Brands; Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners, d/b/a Rainier Distributing Co.; and A. Levy and J. Zentner Co., d/b/a

Valley Beverage Company, as successor to Rainier Distributing Co.; the respondents herein.

/s/ GERALD A. BROWN,  
Regional Director, National Labor Relations Board,  
Twentieth Region.

NLRB—501

(3-1-46)

United States of America  
National Labor Relations Board

### SECOND AMENDED CHARGE

Pursuant to Section 10 (b) of the National Labor Relations Act, the undersigned hereby charges that E. A. Sparks, d/b/a Acme Beverage Company at Sacramento, California, employing 12 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company, on or about July 30, 1946, discharged from its employ the following persons: R. Anderegggen, Archie P. Cope, Albert Kozlosky, Manuel Machado, Theodore G. Parks, and Victor Stassi because of their membership in International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

By the acts set forth in the paragraph above and by other Acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge.) : International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227.

(Address) : 601 Polk Street, San Francisco, California. (Telephone) : GR. 4-8646.

Do Not Write in this Space—Case No. 20-C-1570.  
Docketed 1/26/48.

By /s/ HAROLD H. BONDY,  
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, California, as true to the best of deponent's knowledge, information, and belief.

/s/ NATALIE P. ALLEN,  
Board Agent.

(Submit Original and Three Copies of this Charge.)

NLRB 501

(3/1/46)

United States of America  
National Labor Relations Board

**SECOND AMENDED CHARGE**

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that George F. Gothmann, d/b/a Sterling Brands, at Sacramento, California, employing 14 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company, on or about August 1, 1946, discharged from its employ the following persons: Edgar Main, Jr., Arnold Bird, William Booth, John Gonsalves, Charles W. Follett, Clarence Kullil, Leo Kozlosky, John L. Huston, Lynn Matteson, Angelo D'Agostino, and Emmet McCauley, because of their membership in International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

By the acts set forth in the paragraph above and by other acts and statements, it, by its officers, agents and employees interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in viola-

tion of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge): International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO.

(If labor organization, local name, number and affiliation): Local 227.

(Address): 601 Polk Street, San Francisco, Calif.

(Telephone number): GR. 4-8646.

Do Not Write In This Space. Case No. 20-C-1571.  
Docketed 1/26/48.

By /s/ HAROLD H. BONDY,  
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, Calif., as true to the best of deponent's knowledge, information, and belief.

/s/ NATALIE P. ALLEN,  
Board Agent.

(Submit original and three copies of this Charge.)

NLRB 501

(3-1-46)

United States of America  
National Labor Relations Board

## SECOND AMENDED CHARGE

Pursuant to Section 10(b) of the National Labor Relations Act, the undersigned hereby charges that Alfred A. Barosso, Andrew W. Willi, Joseph W. Bowman, William A. Hartford, and A. Levy and J. Zentner Co., co-partners d/b/a Rainier Distributing Co., and A. Levy and J. Zentner Co., d/b/a Valley Beverage Company, as successor to Rainier Distributing Co., at Sacramento, California, employing 9 workers in Beer Distributing, has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subsections (1) and (3) of said Act, in that

1. Said Company on or about August 5, 1946, discharged from its employ the following persons: Alfred Costanzo, W. E. Beagle, Vernon Beagle, Tom J. Enos, Gilbert Kozlosky, Mike Matievich, Oscar Matranga, Ernest Bowles, and George P. Wolff, because of their membership in Int'l Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, and their failure and refusal to become and remain members of Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL.

2. By the acts set forth in the paragraph above and by other acts and statements, it, by its offi-

cers, agents and employees, interfered with, restrained and coerced its employees in the exercise of the rights guaranteed in Section 7 of the said Act, in violation of Section 8, subdivision (1) of said Act.

The undersigned further charges that said unfair labor practices are unfair labor practices affecting commerce within the meaning of said Act.

(Full name of labor organization or person filing charge): International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America, CIO.

(If labor organization, local name, number and affiliation): Local 227.

(Address): 601 Polk Street, San Francisco, Calif.

(Telephone number): GR. 4-8646.

Do Not Write In This Space. Case No. 20-C-1572.  
Docketed 1/26/48.

By /s/ HAROLD H. BONDY,  
Int. Rep.

Subscribed and sworn to before me this 26th day of January, 1948, at San Francisco, Calif., as true to the best of deponent's knowledge, information and belief.

/s/ NATALIE P. ALLEN,  
Board Agent.

(Submit Original and Three Copies of This Charge.)

## EXHIBIT B

EXCERPTS FROM THE OFFICIAL REPORT  
OF THE PROCEEDINGS BEFORE THE  
NATIONAL LABOR RELATIONS BOARD  
IN CASE No. 20-C-1570, 1571, 1572.

Proceedings of June 14, 1948:

\* \* \*

“Mr. Rowland: On behalf of E. A. Sparks and George F. Gothmann, I will object to the introduction of the documents in evidence on the ground that there has been no proof of service of the charges in the time required by law; further, that there is no showing that the Board has authority to issue the Complaint in the matter, in the absence of such service.” (P. 11)

\* \* \*

“Mr. Kennedy: The same objection to the introduction in evidence is made on behalf of the parties whom I designated here. It appears on the face of the documents filed that no notice was given within six months; there was no filing or service.

“Trial Examiner Whittemore: What was that?

“Mr. Kennedy: It appears on the face of the documents themselves that no notice—that is, no charges were filed nor were any charges served, within six months from the date of the occurrence of the alleged violation.” (P. 12)

\* \* \*

“Mr. McCarthy: \* \* \* the jurisdiction of a body set by Congress must be affirmatively established

and may not be assumed. That applies to the Circuit Courts and all Boards. Consequently, we must go on the record that is offered. The record that is offered to the earliest date is the 26th day of January, 1948.

“So long as the matter is jurisdictional, I think it is up to the Board’s Counsel to establish his right to proceed.” (P. 15)

\* \* \*

“Mr. Ernst: \* \* \* Now as to the other documents prior to ‘q’ through ‘v,’ that is ‘a’ through ‘p,’ we do not believe that they are properly admissible in evidence, on the ground that the Board has no authority, no jurisdiction to proceed with this case, in view of the fact that Section 10(b) prohibits them from issuing the complaint that was issued in this case. Since the General Counsel’s complaint is not permitted by law and the Board has no authority or jurisdiction to entertain or take any action on the basis of a complaint that the General Counsel cannot issue, this entire proceeding is non-existent simply by lack of jurisdiction of the Board to proceed; and for that reason, the Board can take no action.

“Similarly, there is no proof in the proceedings here that the charging party or parties, whichever it may be, have complied with the Communist Affidavit provisions and the information provisions. Until there is proof that that has occurred, there is no showing that the General Counsel had any authority to issue the Complaint. Until there is a showing that the General Counsel had authority to

issue the Complaint, there is no basis for proceeding here and there is no basis for accepting in evidence a document which purports to be a complaint.

"Under those circumstances, it seems clear that the Board has not given the necessary foundation evidence with respect to the documents in order for them to be accepted in evidence. They are merely pieces of paper, and I see no reason why pieces of paper should be accepted in evidence until the foundation to show that they are actually what they purport to be has been shown.

"I am not certain as to whether service of the other documents is clearly taken care of, although it may be.

"Trial Examiner Whittemore: Does General Counsel wish to be heard on these various objections?

"Mr. Law: Well, I am reluctant to even dignify the objections by an extended answer. I think they are without merit on their face. Unless the Trial Examiner wishes whatever assistance he might derive from argument on specific objections, I don't feel that an answer is necessary.

"Is there any particular point made upon which you would like the assistance of argument?

"Trial Examiner Whittemore: I think not. I think counsel who made the objections will agree that if I don't receive these documents in evidence, there will be no support in the record from which he may argue.

"Mr. Ernst: I think, Mr. Examiner, my point is that the General Counsel should lay the founda-

tions before they are accepted into evidence, and when he puts the foundation evidence in then perhaps some, or perhaps even all of them might be shown to be material.

“Trial Examiner Whittemore: Just what are you going to argue on, if we don’t receive them in evidence?

“Mr. Ernst: Then you won’t have a Complaint issued and you can’t issue an Order.

“Trial Examiner Whittemore: I will overrule the objection.” (Pp. 28-30)

\* \* \*

“Trial Examiner Whittemore: \* \* \*

“It is my understanding, then, simply to sum matters up, that the Respondents and the prospective Intervener are contending that 10(b) of the Act specifically makes it mandatory that not only should there have been a filing of the charge within the six months period after the occurrence of the alleged unfair labor practices, but that each of the Respondents must have been served with copies of those charges.

“Mr. Ernst: That is correct.

“Trial Examiner Whittemore: Is that, in substance, your position?

“Mr. Ernst: Yes.

“Mr. Kuchman: Precisely.

“Trial Examiner Whittemore: As I understand it, General Counsel’s position is that since the unfair labor practices and the original charges occurred before the passage of the Act, that Section

10(b) does not apply. Is that, in essence, General Counsel's position?

"Mr. Magor: That is our contention.

"Mr. Law: We think that it might apply had there been no charges at all filed within six months of the alleged occurrences, but that is not the situation we are confronted with.

"Trial Examiner Whittemore: Then you claim that charges were filed within the six months period?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Regardless of whether it was before the Act was passed or not?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Your claim is that under any circumstances charges were filed within the six months period?

"Mr. Law: Yes.

"Trial Examiner Whittemore: Do you also claim that service was made? I think that gets back to the point where you were sure you were informed of them but you were not positive of service.

"Mr. Law: We can and will show that they were served prior to the expiration of the six months period established by the amendments to the Act.

"Trial Examiner Whittemore: Well, then on that point you would bring into play your contention that even though they were filed within the six months period, it wasn't essential under the terms of the Act that they were filed within the six months period or served within the six months period, as I understand it, your contention would

be that as long as they were served within six months after the effective date of the Act, they would come then within the provision, is that correct?

"Mr. Law: I think so, yes. We have a hypothetical situation that if no charges had been filed at all within six months of the alleged occurrences, I doubt if the Board would have jurisdiction. But we are simply not confronted with that situation here.

"Trial Examiner Whittemore: It seems to me the one weakness which you concede now is the possible weakness of service.

"Mr. Law: We are not fully prepared to go ahead on that point, as I have said. We will show that there was service within the six months period after the effective date of the new Act. We will, as an alternative position, in order to be sure, if it is necessary, establish that Respondents were also informed of the content of the charges and perhaps were served with the charges at earlier times."

(Pp. 32-34)

\* \* \*

#### Proceedings of June 15, 1948

\* \* \*

"Mr. Ernst: Mr. Examiner, before we go into your ruling on the objection, I think there has been no evidence to show that the union involved here has complied with (f), (g), and (h), Section 9, and I wondered if the proper procedure isn't to have that showing, both because of the appearance of Counsel for the union and secondly because the complaint is based upon a charge signed by that union. We

have a running objection, I have said, as to the point.

“Trial Examiner Whittemore: It seems to me that you or somebody has raised this question before and it already has been disposed of.” (P. 223)

\* \* \*

“Q. (By Mr. Rowland): Mr. Main, were you at the time of this trouble an officer of Local 227?

“A. Yes, sir.

“Q. Are you an officer now?

“A. Yes, sir.

“Q. Have you filed the non-communist affidavit?

“Mr. Leonard: Objected to on the ground it is incompetent, irrelevant, and immaterial.

“Trial Examiner Whittemore: I will sustain the objection.

“Mr. Rowland: May I inquire at this point, is it the position of the Examiner that we have no right to inquire as to whether or not the affidavits have been filed and whether the charging union here is qualified under the Act?

“Trial Examiner Whittemore: Very frankly, Mr. Rowland, I am under the impression that it is neither your business nor my business as to whether or not they have done it. Congress specifically stated it was General Counsel’s business, and I frankly don’t consider that either you nor I are involved. That is General Counsel’s responsibility to see to it that that provision of the Act is lived up to before the complaint is issued.

“Mr. McCarthy: And there is no way to test

any error of judgment on the part of the General Counsel? We must be bound by that also?

“Trial Examiner Whittemore: Well, I have not happened to have run into this particular issue before. I don’t know of any—it is an administrative matter.” (Pp. 260-261)

\* \* \*

“Mr. Ernst: Mr. Examiner, could we ask General Counsel if General Counsel’s office will give us the information as to who are the officers of Local 227 and who should have filed affidavits, and if they will give us the information as to when they did? It being our contention that these matters must be disposed of before you can go into the merits of the case.

“Mr. Law: Well, we must, of course, refuse. It is our contention that the compliance of the charging union is not a matter for litigation at this hearing.” (P. 278) \* \* \*

\* \* \*

“Trial Examiner Whittemore: Well, we have been here nearly two days now. I suggest we get down to the actual issues in the case which you are here to meet, the issues which are in the complaint.

“Mr. Ernst: If there is no complaint, Mr. Examiner, there are no issues.

“Mr. Leonard: There is a complaint, introduced in evidence.

“Mr. Ernst: There is no complaint unless jurisdiction is present to issue a complaint; that is about

the first day out in the administration of law. Now, that being the case, I think we are entitled to get an answer from General Counsel and C. I. O. whether they are going to help us; secondly, if they are not, whether the Trial Examiner will ask General Counsel and Counsel for the C. I. O. to give us any information on that. Can't we have simple answers to those questions?

“Mr. Law: You have our answers already.

“Trial Examiner Whittemore: You have answers to the questions from two individuals to whom you have raised them. You have not raised them to the Trial Examiner as yet.

“Mr. Ernst: We hereby request the Trial Examiner to request General Counsel and Counsel for the C. I. O. to procure that information.

“Trial Examiner Whittemore: I regret to inform you I must decline.” (Pp. 279-280)

#### Proceedings of June 22, 1948

\* \* \*

“Q. (By Mr. Kuchman): From whom would you receive the charges which you docketed?

“A. From the Regional Director.

“Q. Who would that be?

“A. Mr. Brown.

“Q. And how would you determine the docket number?

“A. We keep a record of numbers in a docket book in the office, and you always take the next number.

“Q. And what is the significance of the docket number? Does it represent a file?

"A. Yes, it does.

"Q. And does the file then contain all of the papers pertaining to that proceeding?

"A. Yes, it does.

"Q. Is it indicated in that docket whether or not affidavits had been filed by the charging Union, on behalf of its officers, that they are not members of the Communist Party?

"Mr. Magor: I object to that question on the grounds it is incompetent, irrelevant and immaterial to the issues in this case, wholly apart from the direct examination.

"Trial Examiner Whittemore: I will sustain the objection.

"Mr. Ernst: Well, Mr. Examiner, they brought the person in here to testify and apparently they have written consent from the General Counsel for the witness to testify as to what she does and what are in her records and what are in their files. They have opened it up on direct examination, they have got the written authority to put her on, and I think we are entitled to go into everything that is in the files under her control.

"Mr. Magor: It is a wholly collateral attack.

"Trial Examiner Whittemore: I see no reason to reverse my ruling." (Pp. 684-685)

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 25, 1948.

[Title of District Court and Cause.]

## REQUEST FOR ADMISSION OF FACTS

Louise Hamilton, through her attorneys, Messrs. Anthony J. Kennedy, Carl Kuchman, Gilford G. Rowland and Richard Ernst, requests the General Counsel of the National Labor Relations Board within ten days after service of this request to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the hearing.

That the following document, exhibited with this request, is genuine.

1. Order Consolidating Cases and Notice of Consolidated Hearing in National Labor Relations Board Case No. 20-C-1570, 1571, 1572, dated April 26, 1948 (with "complaint" attached thereto), copy of which constitutes Exhibit A attached to Respondent's Return to Order to Show Cause and Answer to Application for Order.

That each of the following statements is true:

1. Exhibit A attached to the Respondent's Return to Order to Show Cause and Answer to Application for Order is a true and correct copy of the document of nine pages, which was bound together by a metal staple, forwarded by registered mail on or about April 26, 1948, to certain of the respondents named therein by someone employed in the Twentieth Region office of the National Labor Relations Board.

2. Exhibit B attached to Respondent's Return to Order to Show Cause and Answer to Application for Order contains true and correct excerpts from the official record of the proceedings before the National Labor Relations Board in Case No. 20-C-1570, 1571, 1572.

3. During the period between August 23, 1947, and June 15, 1948—files of the National Labor Relations Board relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572 contained no affidavit satisfying Section 9(h) of the Act—to-wit: that the affiant was not a member of the Communist party or affiliated with such party and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods—signed by any person claiming to be an officer or agent or representative of Local 227 of International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, other than Eugene J. McCann and Harold A. Bondy.

4. Eugene J. McCann who had such affidavit on file gives his position as "General Super and Trustee, State of California," and Harold A. Bondy, who had such affidavit on file, gives his position as "Assistant General Super and Trustee, State of California."

5. Up to June 15, 1948, the Board's files relied on by the General Counsel in issuing the complaint in

Case No. 20-C-1570, 1571, 1572, contained no affidavit purporting to satisfy Section 9(h) of the National Labor Relations Act signed by a President or Secretary of said Local 227 until, if at all, sometime after June 15, 1948.

6. The General Counsel of the National Labor Relations Board makes no contention that any person aggrieved by any one of the unfair labor practices charged or involved in National Labor Relations Board Case No. 20-C-1570, 1571, 1572, was prevented from filing a charge with respect thereto by reason of service in the armed forces.

Dated: August 27, 1948.

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Attorneys for Respondent.

(Acknowledgment of Service.)

[Endorsed]: Filed Aug. 31, 1948.

In the United States District Court for the Northern District of California, Northern Division

No. 6025

NATIONAL LABOR RELATIONS BOARD,  
Applicant,  
vs.

LOUISE HAMILTON,  
Respondent.

### MEMORANDUM AND ORDER

An application has been addressed to this court by the National Labor Relations Board, hereinafter called the "Board," for an order requiring obedience to a subpoena duces tecum issued by the Board during its hearing of cases Nos. 20-C-1570, 20-C-1571 and 20-C-1572. Charges alleging unfair labor practices had been filed with the Board by a labor organization January 26, 1948, which practices are alleged to have occurred August 1st and August 5th, 1946. A. Levy and J. Zentner Co., a corporation, were served with the charges on or about February 13th, 1948. General Counsel of the Board issued a complaint April 28th, 1948, which was based on said charges.

A subpoena duces tecum was issued by the Board and on June 23rd, 1947, it was served on respondent herein, Louise Hamilton, a bookkeeper employed by A. Levy and J. Zentner Co., one of the companies so charged. Respondent refused to appear be-

fore the Board and contends that the Board is without jurisdiction for the following reasons: (1) the alleged unfair labor practice occurred more than six months before the charge was filed; (2) there is no showing that non-communist affidavits were filed by the officers of the Union, that copies of the Union's constitution were filed or that the financial reports were made to the Secretary of Labor, all of which are under the terms of the Act and must be complied with before a complaint may be issued. Section 9(f) (g) and (h) of the National Labor Relations Act.

Applicant contends that the requirements under Section 9 (f) (g) and (h) of the Act are in the nature of administrative determination and that the issuance of a complaint is a tacit allegation that the requirements have been met. Respondent argues that such matters are jurisdictional and should be set forth in the complaint in a manner similar to that required of pleadings in the district courts.

Contained in the 1947 amendments to the National Labor Relations Act is the proviso in Section 10 (b) 29 U.S.C.A. 160 (b) "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person with whom such charge is made \* \* \*." (Underlining mine.) The amendments were passed June 23, 1947, and became effective August 23, 1947.

The effect of the provision in Section 10 (b) was

to create for the first time a limitation to the right to issue complaints under the Act. Respondent seeks to restrict the time in which applicant might issue and serve a complaint to the interval between the date of passage and the effective date of the amendment while applicant takes the view that the limitation should be six months from the effective date. If respondent's position prevails the initial proceedings are barred, otherwise they are timely.

Where by statute the time within which the existing right may be exercised is shortened parties effected must be afforded a reasonable time to exercise their remedy. *Rand v. Bossen*, 162 F. 2d 157, 27 C. 2d 61.

The issuance of a complaint being a matter of discretion with the General Counsel of the Board it would seem unreasonable to require all possible complaints to be considered and rushed to completion within two months when prior to that time no limitation was imposed. Normally, changes of procedure operate in the future and not retroactively; *National Labor Relations Board v. National Garment Co.*, 166 F. 2d 233, and *National Labor Relations Board v. Brozen*, 166 F. 2d 812. From either viewpoint it follows that the period for filing charges should be determined to be from August 23, 1947, the effective date of the amendment and within the following six months period (or for the six month period following the alleged unfair labor practice, whichever is later).

However, the District Court's interest in granting or denying an order to enforce an administra-

tive subpoena is limited to the questions of whether there is a proceeding pending before the Board over which it has jurisdiction and if the matter sought by the subpoena is relevant to the investigation. *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692.

Undoubtedly compliance with the sections of the Act questioned herein would be required for enforcement by the Courts of a final order of the Board, *National Labor Relations Board v. Brozen*, supra. The question is not a proper one for determination in the collateral matter relating to the enforcement of subpoena. It is well settled that there must be an exhaustion of administrative remedy before a Court may intervene. Respondent did not appeal as provided under the Rules of the Board and has not properly raised the question of jurisdiction before the Board. Courts will not review an administrative agency's jurisdiction before the agency has reached its final decision on the substantive issue. The agency should be free to formulate its own procedural rules. *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 226.

Administrative pleading and procedure is not held to be as formal and as strict as that of the courts and the Federal Rules of Civil Procedure do not apply. Nevertheless, it would seem that administrative boards, acting in a quasi-judicial capacity, might well require that complaints set forth jurisdictional facts in a fashion similar to that required in the District Courts. This might tend to alleviate the feeling all too common that administrative bod-

ies are a law unto themselves. Congress in amending Section 10 (b), which resulted in the requirement that rules of evidence applicable in District Courts of the United States under the Rules of Civil Procedure be followed so far as practicable has indicated a more formal proceeding by the Board is expected. This is purely suggestive as in a collateral matter, such as this, the Court should not try the main issues in the proceeding pending before the Board. Where there is no final determination by the Board the Court should issue an order enforcing a subpoena if the record shows that the Board may have jurisdiction and that there is a reasonable foundation for the proceeding. The Court should not invade the administrative field when there is a direct administrative procedure to relieve the condition complained of by the aggrieved party and that remedy has not been exhausted.

The records sought to be obtained by the subpoena duces tecum appear relevant in assisting the Board in its determination as to whether or not A. Levy and J. Zentner Co. was doing interstate business.

Petitioner's application for an order requiring obedience to its subpoena duces tecum is granted.

Dated: December 28th, 1948.

/s/ DAL M. LEMMON,

United States District Judge.

Entered in Civil Docket Dec. 28, 1948.

[Endorsed]: Filed Dec. 28, 1948.

[Title of District Court and Cause.]

**ORDER REQUIRING OBEDIENCE TO  
SUBPOENA DUCES TECUM**

This Court having, on December 28, 1948, issued its Memorandum and Order in the above-captioned matter granting the application by the National Labor Relations Board for an order requiring obedience to the subpoena duces tecum served upon the respondent, Louise Hamilton;

**It Is Hereby Ordered** that the respondent, Louise Hamilton, appear before a Trial Examiner for the National Labor Relations Board at 10:00 o'clock in the forenoon, on the 31st day of January, 1949, in the Supervisors' Chambers of the County Court House, 7th and I Streets, Sacramento, California, and there testify and produce the books, records, correspondence and documents in compliance with the said subpoena duces tecum, and attend before the said Trial Examiner from day to day until her examination shall have been completed.

**It Is Further Ordered** that service of a copy of this order upon the respondent on or before the 21st day of January, 1949, by registered mail, shall be deemed sufficient service.

/s/ **DAL M. LEMMON,**  
United States District Judge.

Dated: January 17th, 1949.

[Endorsed]: Filed Jan. 17, 1949.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS FOR THE NINTH  
CIRCUIT

Notice Is Hereby Given that Louise Hamilton, respondent above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the "Memorandum and Order" made and entered in this action on December 28, 1948, and from the "Order Requiring Obedience to Subpoena Duces Tecum" made and entered on January 17, 1948, and from each of them severally.

Dated: January 26, 1949.

/s/ ANTHONY J. KENNEDY,

/s/ CARL KUCHMAN,

/s/ GILFORD G. ROWLAND,

/s/ RICHARD ERNST,

Attorneys for Appellant

Louise Hamilton.

[Endorsed]: Filed Jan. 27, 1949.

---

[Title of District Court and Cause.]

ORDER GRANTING SUPERSEDEAS

This cause came on to be heard on motion of the respondent for a stay pending respondent's appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing to the court that defendant is entitled to such a stay,

It Is Ordered that the enforcement of and any

proceedings to enforce the "Memorandum and Order" entered herein on December 28, 1948, or the "Order Requiring Obedience to Subpoena Duces Tecum" entered herein on January 17, 1949, and each of them severally, be stayed pending the determination of respondent's appeal from such orders and each of them, upon the filing by defendant and approval of this court of a bond in the sum of Five Hundred Dollars (\$500.00).

Dated January 27th, 1949.

/s/ DAL M. LEMMON,  
District Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 27, 1949.

---

[Title of District Court and Cause.]

#### DESIGNATION OF RECORD AND STATEMENT OF POINTS

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Application for Order Requiring Obedience to Subpoena Duces Tecum, filed July 29, 1948, omitting the verification and Exhibit No. 1, Parts a. and b, Exhibit No. 2 (the correct form of which is Exhibit A attached to the return to order to show cause and answer to application for order), and Exhibit No. 3 but including Exhibit No. 4.

2. Return to Order to Show Cause and Answer

to Application for Order (including exhibits attached thereto), filed by Respondent Louise Hamilton on August 25, 1948.

3. Request for Admission of Facts, dated August 27, 1948, and filed August 31, 1948. No denial or objections to said request were filed.

4. Memorandum and Order, dated and filed December 28, 1948.

5. Order Requiring Obedience to Subpoena Duces Tecum, filed January 17, 1949.

6. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, filed January 27, 1949.

7. Order Granting Supersedeas, dated January 28, 1949, and filed January 31, 1949.

8. Statement of Points on which appellant intends to rely.

9. This Designation.

#### STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

1. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that said purported complaint is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

2. The court erred in not finding that the Na-

tional Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that no charge, within the meaning of the law, was filed.

3. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that at the time of the preparation and mailing of said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly, the president and the secretary of such organization.

4. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that said purported complaint contains no allegations of the jurisdictional facts required by Section 9(f), (g), (h) of the National Labor Relations Act.

5. The court erred in not finding that the National Labor Relations Board has no possible statutory authority to proceed in its hearing based on the purported complaint in its proceeding Cases Nos. 20-C-1570, 1571, 1572, in view of the fact that, within the meaning of the law, no complaint issued.

6. The court erred in finding that respondent Louise Hamilton failed to exhaust her administrative remedies.

7. The court erred in finding that respondent Louise Hamilton had not properly raised the question of jurisdiction before the court.

Dated at San Francisco, California, February 16, 1949.

/s/ ANTHONY J. KENNEDY,  
/s/ CARL KUCHMAN,  
/s/ GILFORD G. ROWLAND,  
/s/ RICHARD ERNST,  
Attorneys for Louise  
Hamilton.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 16, 1949.

---

[Title of District Court and Cause.]

#### CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated by the defendant.

Application for order requiring obedience to subpoena duces tecum.

Exhibit 4.

Return to order to show cause and answer to application for order.

Request for admission of facts.

Memorandum and order.

Order requiring obedience to subpoena duces tecum.

Notice of appeal.

Order granting supersedeas.

Designation of record and statement of points.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 28th day of February, A.D. 1949.

[Seal]

C. W. CALBREATH,  
Clerk.

---

[Endorsed]: No. 12197. United States Court of Appeals for the Ninth Circuit. Louise Hamilton, Appellant, vs. National Labor Relations Board, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Northern Division.

Filed March 1, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth District.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12197

LOUISE HAMILTON,

Appellant,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

STATEMENT OF POINTS AND  
DESIGNATION OF RECORD

The points upon which appellant intends to rely are as follows:

1. The District Court erred in not denying enforcement of the subpoena of the National Labor Relations Board on the ground that the Board has no possible jurisdiction or authority to proceed with the hearing, in the Board's proceeding "Cases Nos. 20-C-1570, 1571, 1572," to which the subpoena was ancillary.

2. The District Court erred in not finding that the National Labor Relations Board has no possible jurisdiction or authority to proceed in the said hearing in consequence of the fact that the purported complaint—upon which any jurisdiction or authority depends—is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

3. The District Court erred in not finding that no charge, within the meaning of the National Labor Relations Act, was filed to commence the said proceeding and in consequence thereof that the Board has no possible jurisdiction or authority to proceed in the said hearing.

4. The District Court erred in not finding that at the time of the preparation and mailing of the said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly the President and Secretary of such organization, and in consequence thereof that the Board has no possible authority or jurisdiction to proceed in the said hearing.

5. The District Court erred in not finding that the National Labor Relations Board has no possible authority or jurisdiction to proceed in the said hearing in consequence of the fact that the said purported complaint contains no allegations of the jurisdictional facts required by Section 9 (f), (g), (h) of the National Labor Relations Act.

6. The District Court erred in not finding that no complaint issued in the Board proceeding "Cases Nos. 20-C-1570, 1571, 1572," and in consequence that the Board has no possible jurisdiction or authority to proceed in the said hearing in that proceeding.

7. The District Court erred in finding that appellant Louise Hamilton failed to exhaust her administrative remedies.

8. The District Court erred in finding that appellant Louise Hamilton had not properly raised the question of jurisdiction before the National Labor Relations Board.

### DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Application for Order Requiring Obedience to Subpoena Duces Tecum filed July 29, 1948, omitting the verification and omitting all exhibits except Exhibit No. 4.

2. Return to Order to Show Cause and Answer to Application for Order (including exhibits attached thereto), filed by Appellant Louise Hamilton on August 25, 1948.

3. Request for Admission of Facts, dated August 27, 1948, and filed August 31, 1948. No denial or objections to said request were filed.

4. Memorandum and Order, dated and filed December 28, 1948.

5. Order Requiring Obedience to Subpoena Duces Tecum, filed January 17, 1949.

6. Notice of Appeal to the Circuit Court of Appeals for the Ninth Circuit, filed January 27, 1949.

7. Order Granting Supersedeas, dated January 28, 1949, and filed January 31, 1949.

8. Statement of Points on which appellant intends to rely.

9. This Designation.

Dated: March 8, 1949.

/s/ ANTHONY J. KENNEDY,  
/s/ CARL KUCHMAN,  
/s/ GILFORD G. ROWLAND,  
/s/ RICHARD ERNST,

Attorneys for Louise  
Hamilton.

(Acknowledgment of Service.)

[Endorsed]: Filed March 8, 1949. Paul P.  
O'Brien, Clerk.



No. 12,197

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

---

LOUISE HAMILTON,

*Appellant,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

---

Brief on Behalf of Appellant  
Louise Hamilton

---

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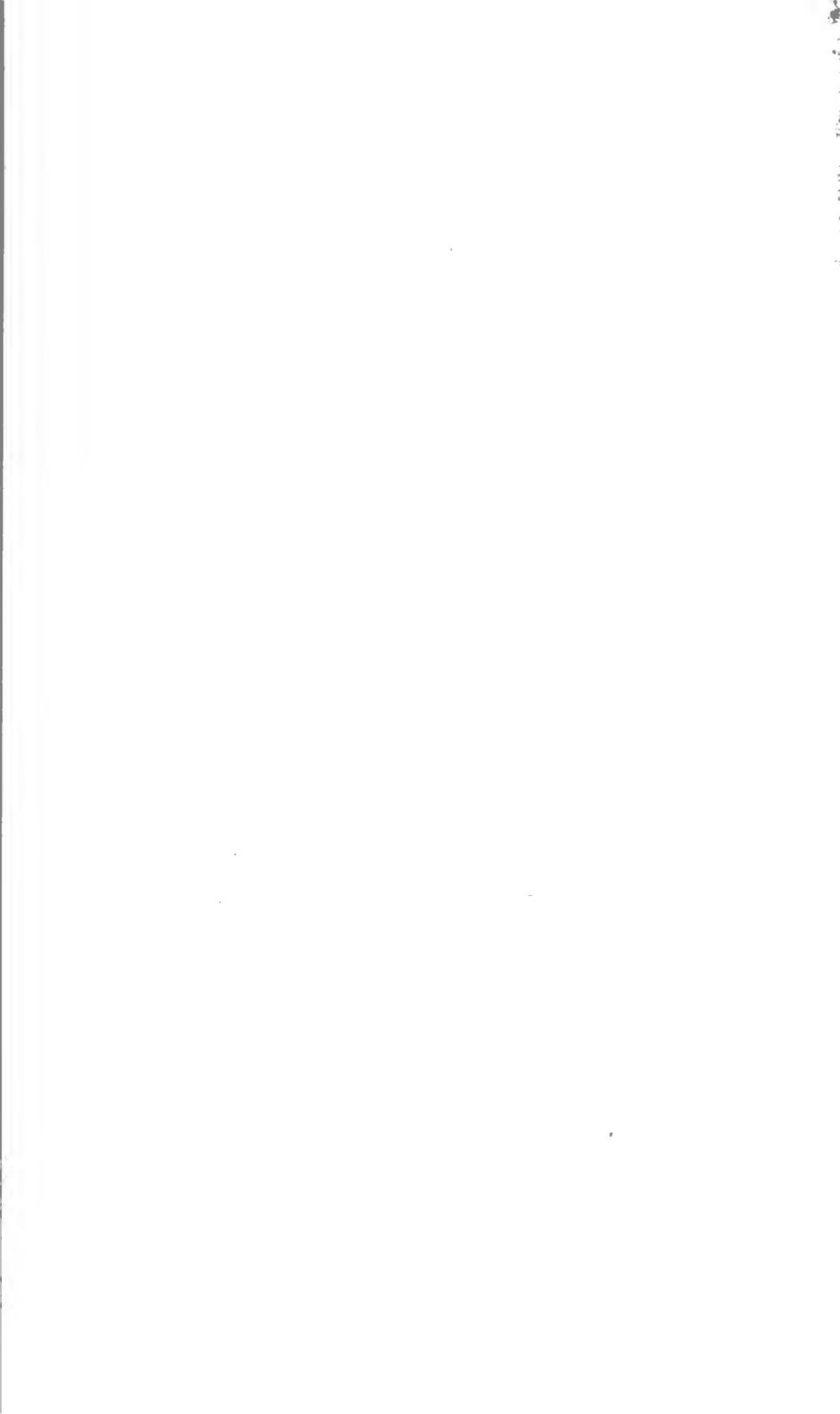
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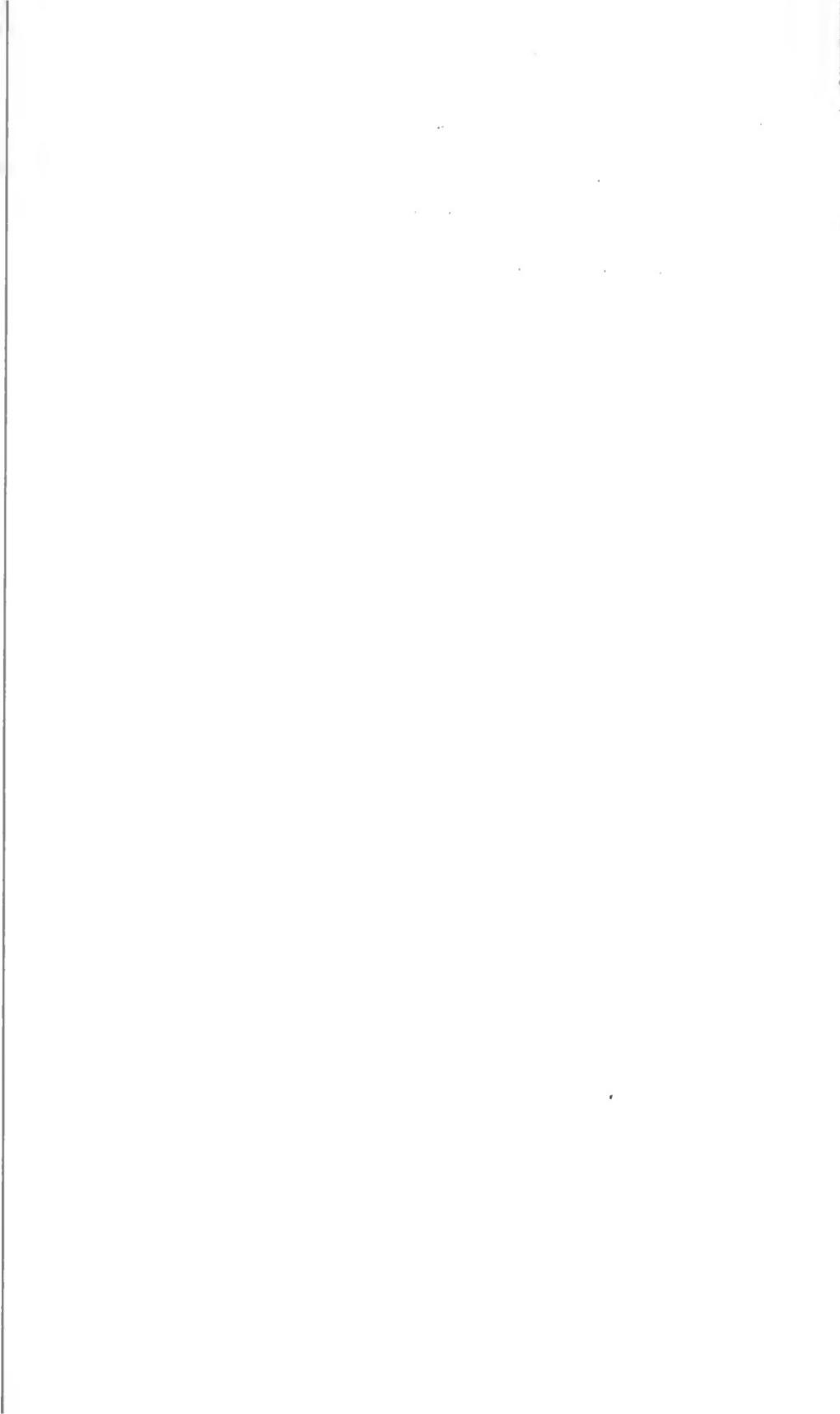
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IN THE  
**United States  
Court of Appeals  
For the Ninth Circuit**

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LOUISE HAMILTON,

*Appellant,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

---

**Brief on Behalf of Appellant  
Louise Hamilton**

---

**STATEMENT REGARDING JURISDICTION**

This is an appeal from an order of the United States District Court for the Northern District of California, Northern Division, directing enforcement of a subpoena of the National Labor Relations Board.

The proceeding was commenced in the District Court by an application filed by the Labor Board. It sought court enforcement of a subpoena issued by the Board. This had

issued in the course of a hearing being conducted by a Trial Examiner in the Board's proceeding designated Case No. 20-C-1570, 1571, 1572. It was directed to Louise Hamilton, appellant in this Court, who is not one of the parties to the proceeding before the Board. After she was served with the subpoena, the appellant filed with the Board her petition to revoke the subpoena (R. 9-12). This was filed in accordance with Section 11(1) of the National Labor Relations Act and with the Rules and Regulations of the Board with respect to subpoenas. Appellant's petition was based upon the same grounds as those she relies upon on this appeal.

Subsequent to her filing of the petition to revoke the subpoena, the appellant Louise Hamilton was directed by the Trial Examiner to be sworn. Upon advice of counsel, she refused to do so on the grounds stated in the petition.

Thereafter, the General Counsel on behalf of the Board filed on July 29, 1948 its "Application for Order Requiring Obedience to Subpoena Ducez Tecum" (R. 1-12) with the District Court. In this application the Labor Board alleged that that Court had jurisdiction by virtue of Section 11(2) of the National Labor Relations Act (R. 1).

The appellant herein filed her return to the order to show cause and her answer to the application for the order on August 31, 1948 (R. 13-49). Thereafter, the matter was argued orally and memoranda were filed with the District Court. Subsequently, on December 28, 1948, the District Court issued a memorandum and order requiring obedience to the *subpoena duces tecum* (R. 50-54). On January 17, 1949, an order directing compliance with the *subpoena duces tecum* was issued by the District Court (R. 55).

On January 27, 1949, within 30 days after entry of judgment for the Labor Board, appellant filed a notice of appeal (R. 56). This court has jurisdiction of the appeal (28 U.S.C. Sections 1291, 1294). On January 27, 1949, the District Court issued an order for a stay pending respondent's appeal (R. 56). Appellant filed a designation of the record on appeal on February 16, 1949 (R. 57-58). With this designation, filed in the District Court, appellant filed a statement of the points to be relied upon on this appeal (R. 58-60).

On February 28, 1949, the Clerk of the District Court certified the transcript of record on appeal (R. 60-61). On March 1, 1949, the record was filed with the Clerk of this Court. On March 8, 1949, appellant filed with this Court a statement of points to be relied upon on this appeal and a designation of the record (R. 62-65).

#### **STATEMENT OF THE CASE**

Appellant is an individual whose testimony was demanded by the Labor Board in a formal hearing with respect to alleged unfair labor practices. She was not a party to the proceeding. She was an employee of a partner of one of the employers who was alleged to have engaged in the unfair labor practices.

Appellant contends that the subpoena should not be enforced because such enforcement would sanction an unlawful and unconstitutional abuse of the subpoena power by the Labor Board and would be a misuse of the court's discretion. The witness relies on grounds that she raised before the Board by petition to revoke the Board's subpoena.

The appellant asserts that it is a violation of her statutory and constitutional rights to compel her to comply with the Board's subpoena. This subpoena was issued by the Board in the course of a proceeding that was wholly outside its jurisdiction and authority and over which it had no possible claim of jurisdiction. This affirmatively appears on the face of the formal papers before the Board as well as in the record taken.

This issue arose in the following manner.

Reports that certain acts were unfair labor practices were filed with the National Labor Relations Board by a labor organization on January 26, 1948 (R. 31-34). The reports filed with the Board did not include certain of the allegations that are required by the Board's regulations to constitute a charge of unfair labor practices. Nevertheless, the General Counsel of the Board commenced to proceed under Section 10(b) of the Act on the basis of these reports just as if proper charges of unfair labor practices, as contrasted to mere reports of unfair labor practices, had been filed.

On the face of the purported charges it clearly appears that they complain of certain acts that occurred in August, 1946, some seventeen months prior to their date and their filing. These "charges" were, nevertheless, thereafter served upon certain of the respondents who were said to have been guilty of the alleged unfair labor practices. For the purpose of this proceeding it is admitted that service occurred on February 13, 1948.

Thereafter the General Counsel, apparently disregarding the provision of Section 10(b) of the Act as amended —that no complaint shall issue based on an alleged unfair

labor practice occurring more than six months before the charge is filed *and served*—proceeded to act as if authorized to issue a complaint. Thus on April 26, 1948, a purported complaint and notice of hearing (R. 24-36) was mailed from the office of the Board in San Francisco to certain of the respondents named in the complaint. This document affirmatively shows *upon its face* that it is based upon alleged unfair labor practices that occurred more than seventeen months before the “charges” were prepared, filed or served (R. 31-36).

The form of the purported complaint (R. 26-36) likewise apparently ignores the 1947 amendments to the Act. True, it properly alleges the facts necessary to show the Board’s jurisdiction under the Act as it was prior to the 1947 amendments. It fails, however, to allege the facts necessary to give jurisdiction under the 1947 amendments. Thus the purported complaint is silent as to the jurisdictional fact of the date of the service of a charge and includes no allegation to controvert the fact shown on its face that it was based on a charge filed too late to give it any jurisdiction.

The purported complaint likewise is silent as to the jurisdictional facts of compliance by the charging labor organization with the non-Communist affidavit provisions and other provisions of subsections (f), (g) and (h) of Section 9 of the Act, as amended in 1947. Subsection (h) gives the Board jurisdiction to act on a charge filed by a labor organization only if the officers of that labor organization have each filed a non-Communist affidavit. The purported complaint shows on its face that the charge was filed by a labor organization (R. 32, 34, 36), but it

includes no allegation that the officers of the charging labor organization have filed the required affidavits. It is admitted that no president or secretary of the charging labor organization has filed such an affidavit (R. 48, 49).

Despite the affirmative lack of jurisdiction apparent on the face of the purported complaint and despite the failure of the Board to allege the facts necessary to give the Board jurisdiction, the employers served as respondents were present at the hearing before the Trial Examiner, which began on June 14, 1948.

At the beginning of the hearing, and recurring during its course, these employers brought the foregoing facts to the attention of the Trial Examiner (R. 37-46). The proceeding nevertheless continued from June 14, 1948 to June 23, 1948. On the latter date there was no evidence in the record to cure the defects on the face of the complaint or to show that the Board had jurisdiction over the proceeding. The attorneys representing the General Counsel of the Board advised the Trial Examiner that they would submit no evidence in their case in chief with respect to the jurisdictional facts discussed above and that they had concluded their case in chief with the exception of certain facts as to other matters which they wished to present through the testimony of Louise Hamilton, appellant in this Court.

The General Counsel of the Board had obtained a subpoena requiring Louise Hamilton to testify on or before June 28, 1948. The subpoena was issued purportedly in accordance with the provisions of Section 11(1) of the Act. It was served on the witness on June 23, 1948. On the same day, she filed with the Board her

petition to revoke the subpoena, this being done in accordance with Section 11(1) of the Act. This petition (R. 9-12) was filed—as required by the Board's Rules and Regulations, Section 203.31—with the Trial Examiner who was conducting the hearing and who had in fact filled in the blanks as to the name of the witness and the date of her appearance to complete the issuance of the Board's subpoena.

After the petition to revoke the subpoena had been filed, the Trial Examiner announced that the petition was denied. Apparently the Examiner was acting for the Board in accordance with Section 203.35 of the Board's Rules and Regulations, which provides:

“The Trial Examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers \* \* \*.”

“(c) to rule upon petitions to revoke subpoenas.”

After announcing the denial of the petition to revoke, the Trial Examiner of the Board asked the witness to be sworn. The appellant was advised by counsel not to be sworn and to refuse to testify. She did so. Thereupon, still on June 23, 1948, the Trial Examiner adjourned the proceeding of the Board *sine die*.

Subsequently, on July 29, 1948, the National Labor Relations Board filed an “Application for Order Requiring Obedience to Subpoena Ducez Tecum” in the District Court of the United States for the Northern District of California, Northern Division (R. 1-12). Such application alleged that the District Court had jurisdiction by virtue

of Section 11(2) of the National Labor Relations Act which gives such jurisdiction "in case of contumacy or refusal to obey a subpoena issued." (R. 1).

On August 25, 1948 the appellant filed its Return and Answer in opposition to the application (R. 13-46). This repeated the grounds relied upon in the petition to revoke the subpoena. In the petition to revoke the subpoena, before the District Court, and on this appeal *the basic contention of the witness is that the subpoena is ancillary to a Board proceeding over which the Board has no possible jurisdiction or authority to proceed.*

The appellant supported this basic contention by the showing outlined hereinabove based upon the formal papers of the Board and the jurisdictional requirements of Section 9(f), (g) and (h) and Section 10(b) of the Act. The District Court nevertheless ordered enforcement of the subpoena (R. 50-54). Appellant contends that such action deprived her of her constitutional and statutory rights and was an abuse of the discretion granted the court by Section 11(2) of the National Labor Relations Act.

The District Court concluded that the Board had jurisdiction to proceed on the basis of a charge served within six months of the effective date of the 1947 amendments to the National Labor Relations Act even if served more than six months after the acts occurred (R. 51, 52). Appellant contends that this conclusion is contrary to law.

The District Court concluded that it should enforce the subpoena although the formal papers of the Board contained no allegations showing that it had jurisdiction (R. 53, 54). Appellant contends that the failure to allege facts

showing jurisdiction demonstrates that the Board has not made a sufficient claim to jurisdiction over its proceeding to entitle it to judicial enforcement of its ancillary subpoena. We contend this failure has substantially the same effect as a failure to allege jurisdictional facts in the federal courts.

The District Court concluded that the witness could not defend in that court against the abuse of the subpoena power on the ground that administrative remedies had not been exhausted and that the witness had not properly raised the question of jurisdiction before the Board (R. 53). Appellant contends that the defense made in the District Court, and relied upon in this court, may be raised for the first time in court in opposition to the Board's request for judicial relief. She furthermore contends that she properly raised the question of jurisdiction before the Labor Board and exhausted the statutory administrative remedies available to her before the Board went to court.

#### **SPECIFICATION OF ERRORS**

Appellant contends:

1. The District Court erred in not denying enforcement of the subpoena of the National Labor Relations Board on the ground that the Board has no possible jurisdiction or authority to proceed with the hearing in the Board's proceeding "Cases Nos. 20-C-1570, 1571, 1572," to which the subpoena was ancillary.
2. The District Court erred in not finding that the National Labor Relations Board has no possible jurisdiction or authority to proceed in the said hearing in consequence of the fact that the purported complaint—upon which any

jurisdiction or authority depends—is based upon a purported charge that was not served upon the person charged until more than 17 months after the occurrence of the alleged unfair labor practice.

3. The District Court erred in not finding that no charge, within the meaning of the National Labor Relations Act, was filed to commence the said proceeding and in consequence thereof that the Board has no possible jurisdiction or authority to proceed in the said hearing.

4. The District Court erred in not finding that at the time of the preparation and mailing of the said purported complaint there was not on file with the Board a non-Communist affidavit executed by each officer of the charging labor organization, particularly the President and Secretary of such organization, and in consequence thereof that the Board has no possible authority or jurisdiction to proceed in the said hearing.

5. The District Court erred in not finding that the National Labor Relations Board has no possible authority or jurisdiction to proceed in the said hearing in consequence of the fact that the said purported complaint contains no allegations of the jurisdictional facts required by Section 9(f), (g), (h) of the National Labor Relations Act.

6. The District Court erred in not finding that no complaint issued in the Board proceeding "Cases Nos. 20-C-1570, 1571, 1572," and in consequence that the Board has no possible jurisdiction or authority to proceed in the said hearing in that proceeding.

7. The District Court erred in concluding that appellant Louise Hamilton failed to exhaust her administrative remedies.

- 8. The District Court erred in concluding that appellant Louise Hamilton had not properly raised the question of jurisdiction before the National Labor Relations Board.

9. To enforce the subpoena is to deprive the appellant of her rights under the Fourth Amendment to the Constitution of the United States and to deprive her of liberty without due process of law in violation of the Fifth Amendment.

### **ARGUMENT OF THE CASE**

#### **Summary.**

The courts, when called upon to enforce administrative subpoenas, have the duty under the statute and the Constitution to protect individuals against unreasonable or arbitrary exercise of the subpoena power and to refuse to enforce any subpoena issued in excess of the statutory authority or jurisdiction of the administrative board. The Fourth Amendment to the Constitution of the United States prohibits any arbitrary, capricious, unreasonable or unlawful exercise of the subpoena power. The National Labor Relations Act and the Administrative Procedure Act require the court to deny enforcement of a subpoena where an appropriate defense is interposed.

The appellant has several appropriate statutory and constitutional defenses that require the court to refuse enforcement of the subpoena. It affirmatively appears upon the face of the formal documents in the proceeding before the Board that the Board has no possible jurisdiction or authority to carry on its proceeding. The pleadings show that no charge was filed, although the filing of a charge is jurisdictional. They show that neither

a charge, nor even a purported charge, was served within six months of the occurrence of the alleged unfair labor practices, although service within six months is jurisdictional. They fail to contain allegations of jurisdictional facts as to the date of the service of the charge or as to the filing of the non-Communist affidavits required by Section 9 of the Act as amended in 1947.

The appellant, in her timely petition to revoke the subpoena properly filed with the Board, raised all of the foregoing issues before the Board and thereby set in motion all administrative remedies available to her to preclude any action for the enforcement of the subpoena.

The order of the District Court, directing her to comply with the Board's subpoena, violates the statutory and constitutional guarantees of the witness. It does so by refusing to consider her defenses to the subpoena. It does so by enforcing the subpoena issued by an administrative tribunal in the course of a proceeding that was wholly beyond its jurisdiction and authority, which is clear and undeniable first, because of the absence of allegations of the jurisdictional facts and, second, because of the affirmative showing upon the face of the formal papers that there was no possible jurisdiction.

## I.

### **The Witness Has the Right to Raise Her Defenses to the Enforcement of the Subpoena in Court**

The memorandum of the District Court (R. 50-54) states that the witness failed to exhaust her administrative remedies and did not properly raise the question of jurisdiction before the Board. While the brief of the Labor

Board before the District Court suggested these contentions, we believe that the Labor Board will agree that the court was in error in reaching these conclusions and we therefore will not argue these points at length in our opening brief.

**A. IF THE ADMINISTRATIVE REMEDIES HAVE NOT BEEN EXHAUSTED, THE COURT MUST REFUSE TO ENFORCE THE SUBPOENA.**

The Labor Board, *not the witness*, here sought relief in the District Court. Hence, if judicial relief has been prematurely sought, the court should deny the Board's request for judicial relief; it should not deny the respondent below the right to defend against the Board's action in going to court. It is a strange and startling contention that judicial relief must be ordered because there has been no exhaustion of administrative remedies before such relief was sought.

**B. THE WITNESS'S DEFENSES OFFERED IN THIS CASE MAY BE INITIALLY MADE IN THE DISTRICT COURT.**

The District Court, before it may lawfully enforce a subpoena, is required to investigate the facts and determine that the administrative board can show jurisdiction in the proceeding to which the subpoena is ancillary. (Administrative Procedure Act, Sec. 6(e) quoted below in footnote 16.) Here, the Labor Board has utterly failed to meet the burden of presenting at least a *prima facie* claim of jurisdiction and authority to conduct its hearing. The citizen served with the subpoena has the right to defend against judicial enforcement by calling the attention of the court to the obvious showing, upon the face of the formal papers of the Board, that there is no possible basis for Board jurisdiction.

The right to make such a defense was expressly recognized by the Supreme Court in *Myers v. Bethlehem Corporation*. In that case, the Court stated (303 U.S. 41, 49):

“The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a district court; and to such an application appropriate defense may be made.”

Here the witness is presenting a defense that the bare “Complaint” shows the Board cannot have jurisdiction. She has the same right to present this defense as has a person collaterally to attack a judgment or to defend in an ancillary proceeding on the ground that the judgment roll shows there was no jurisdiction in the basic proceeding.

**C. THE WITNESS PROPERLY RAISED THE JURISDICTION OF THE BOARD BEFORE THE BOARD.**

In the present case the witness fully and carefully followed the administrative procedure provided by law to oppose compliance with a subpoena. Immediately after she was served with the subpoena, and five days before her time to appear expired, the witness filed her petition to revoke the subpoena (R. 9-12). This petition was based on the facts and grounds that she relies upon on this appeal. Thus, the petition alleged that on the face of the formal papers before the Board it affirmatively appeared that there was no possible authority or jurisdiction in the Board to carry on the proceeding. It raised the issue as to the time of filing and service of a charge as well as that as to the existence of any charge (Petition, I(a), (b), (c), II(b); R. 9, 10, 12). The petition further alleged that

the purported complaint failed to allege the facts that must necessarily exist, by virtue of the 1947 amendments to the Act, before the Board has jurisdiction to carry on a proceeding. It raised the issues with respect to the failure of the complaint to allege that a charge had been filed and served within six months and its failure to allege that the charging labor organization had satisfied the non-Communist affidavit provisions of the law (Petition I(b), II(b); R. 10-12). The petition further alleged that the record included no proof of these jurisdictional facts and that the attorney representing the General Counsel of the Board had stated that no evidence would be offered or adduced as to such jurisdictional facts (Petition I(c), II(c); R. 11, 12). The petition further alleged in general terms that no complaint had issued (Petition III; R. 12).

This petition to revoke the subpoena was timely and it was filed in accordance with the Board's Rules and Regulations. It fully raised the points that are relied upon on this appeal. Thus, the witness properly raised *before the Board* the question of the Board's jurisdiction through the only statutory procedure open to it, that is, by her petition to revoke the subpoena. By this petition the witness took every step provided by law to dissuade the Board from seeking her testimony and evidence and to raise before the Board the grounds and facts that require the courts to refuse to enforce the Board's subpoena.

**D. THE BOARD HAS TAKEN FINAL ACTION ON THE PETITION TO REVOKE AND SO ALL ADMINISTRATIVE REMEDIES HAVE BEEN EXHAUSTED.**

By her petition to revoke the subpoena, the witness set in motion all statutory administrative remedies. Upon the filing of the petition it became incumbent upon the Board

to revoke the subpoena if appropriate grounds were stated in the petition. Section 11(1) of the Act<sup>1</sup> provides with respect to subpoenas, as follows:

“The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, *and the Board shall revoke*, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.” (The emphasis is added).

No other administrative procedure is provided by law. Thus the Board was obliged to act on the petition and came into full control of the administrative remedies upon the filing of the petition to revoke. We submit the Board cannot now assert, in opposition to the defense to enforcement of the subpoena, that the administrative remedies have not been exhausted.

It seems clear that the petition to revoke the subpoena was denied by the Board. This appears from the fact that the Trial Examiner announced that the petition was denied and he has been delegated by the Board with the

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1. We shall hereinafter from time to time refer to the National Labor Relations Act simply as “the Act.”

power to rule upon such a petition to revoke a subpoena.<sup>2</sup>

In fact, the Board, by its allegations before the District Court, admits that the administrative remedies have been exhausted by the allegation that the court has jurisdiction by virtue of Section 11(2) of the Act. This section gives jurisdiction only "in case of contumacy or refusal to obey a subpoena." If the Board has not acted on the petition to revoke filed with it by the witness, there obviously is no case of contumacy or refusal to obey the subpoena, for neither can occur until the Board has denied the petition to revoke.

Furthermore, the act of the witness in refusing to testify, which in turn led to action by the Board in seeking judicial enforcement of the subpoena, is a *de facto* appeal to the Board from the decision of the Trial Examiner. It required the Board to rule on the petition to revoke in deciding to seek enforcement in court. Thus, the filing of the application in the court itself is the final action of the Board in the administrative proceeding commenced by the witness's petition to revoke the subpoena. The Board has finally and conclusively refused to revoke the petition.

To make any other contention would be wholly arbitrary and capricious. Surely, if the administrative procedure begun by the petition to revoke the subpoena has not been completed, this is solely because the Board has chosen to

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2. Section 203.35 of the Board's Rules and Regulations provides in part:

"The trial examiner shall have authority, with respect to cases assigned to him, between the time he is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers:

\* \* \* \* \*

"(e) To rule upon petitions to revoke subpoenas; \* \* \*."

fail to act as required by the law. Obviously the Board cannot deprive the witness of the right to defend against the Board's abuse of power simply by refusing to act on a proper and timely petition to revoke filed with the Board.

## II.

### **The District Court Should Have Refused to Enforce the Subpoena of the Board Because It Clearly and Affirmatively Appeared on the Face of the Board's Formal Papers That the Subpoena Was Issued in the Course of a Proceeding Wholly Outside the Jurisdiction and Authority of the Board.**

A federal court does not sit as a rubber stamp to enforce indiscriminately all administrative subpoenas. The courts have the duty to prevent abuse of the subpoena power by administrative tribunals. The statutes declare this duty with respect to subpoenas of the Labor Board.<sup>3</sup>

The appropriate defense presented by Louise Hamilton, appellant in this court, is that the Board's formal papers clearly and affirmatively show that the Board could have no possible jurisdiction in the proceeding to which the subpoena was ancillary. We shall hereinafter in this point show, first, the lack of jurisdiction and the fact that it is clearly and affirmatively obvious on the face of the Board's formal papers and, second, that the District Court should have refused to enforce the subpoena in view of this showing.

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3. This duty is imposed upon the courts by Section 11(2) of the National Labor Relations Act and Section 6(c) of the Administrative Procedure Act. These provisions, together with the Senate Report on the subsection from the Administrative Procedure Act, are quoted below in footnotes 15 and 16, infra.

**A. THE BOARD'S FORMAL PAPERS CLEARLY AND AFFIRMATIVELY SHOW THERE WAS NO POSSIBILITY OF JURISDICTION IN THE BOARD.**

The Labor Board, being a creature of legislation, has no inherent or common law power. Hence, its jurisdiction and statutory authority is limited to that granted by the National Labor Relations Act, as amended. 3 Sutherland, *Statutory Construction*, 3rd Ed., Section 6603; *Arrow-Hart and Hegeman Electric Co. v. Federal Trade Commission*, 291 U.S. 587, 598; *Stark v. Wickard*, 321 U.S. 288, 309.

The appellant asserts that the Labor Board has no jurisdiction to proceed on the purported complaint that is the basis for this hearing because (1) no charge was served within six months of the facts, (2) no true charge was filed, (3) the officers of the union that filed the charge did not have the necessary non-Communist affidavits on file with the Board, (4) the jurisdictional facts, negating the above, are not alleged in the complaint, and (5) no complaint was legally issued.

**1. It Affirmatively Appears on the Face of the Formal Papers of the Board That No Charge Was Served Until 17 Months After the Occurrence of the Alleged Unfair Labor Practices Although the Board Has No Jurisdiction to Hold a Hearing on an Unfair Labor Practice Occurring More Than Six Months Prior to the Filing and Service of the Charge.**

The 1947 amendments to the National Labor Relations Act inserted a new proviso immediately after the grant of authority to issue complaints in Section 10(b).<sup>4</sup> It reads:

**4. The entire subsection, as amended, reads:**

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent

*"Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge."

This prohibition on the issuance of a complaint—and in turn on the jurisdiction of the Board to hear—was enacted on June 23, 1947 with provision that it become effective on August 23, 1947. *Labor-Management Relations Act, 1947*, Section 104.

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or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C)."

The formal papers upon which the jurisdiction of the Board depends show that the basis of the proceedings is a document entitled "Second Amended Charge" which is dated January 26, 1948 (R. 31-36). The formal papers further allege that the acts alleged to be unfair labor practices occurred on or about August 1, 1946 (R. 28, 29). The purported complaint that is asserted to give the Board jurisdiction over the hearing is dated April 26, 1948. Thus, it clearly and affirmatively appears that the Board's purported complaint and the entire proceeding is based on an unfair labor practice that occurred approximately 17 months prior to the filing of the charge with the Board and the service of a copy thereof upon the employer alleged to have been guilty of the unfair labor practice.<sup>5</sup>

The amendment quoted above clearly limits the jurisdiction of the Board. The language is jurisdictional on its face. The courts have expressly held that the less positive language at the beginning of Section 10(b) of the Act limits the jurisdiction of the Board.<sup>6</sup> Thus, the language authorizing the Board to issue a complaint and hold a hearing "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice" has been held to make the filing of a charge and the issuance of a complaint jurisdictional facts. *Labor Board v. Hopwood Retinning Co.*, 98 F.(2d) 97, 101; see *Labor Board v. National Licorice Co.*, 104 F.(2d) 655, 658. Furthermore, the language added to Section 10(b) is very similar to that incorporated in Section 8 of the Norris-LaGuardia Act, reading:

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5. The Board admits that the delay in serving the charge is not excusable by reason of service in the armed forces (R. 49).

6. This provision is quoted in full in footnote 4.

"No restraining order or injunctive relief shall be granted to any complainant who has failed to comply \* \* \*" (29 U.S.C. Sec. 108)

This language has been held to be jurisdictional and deprives the federal courts of any jurisdiction except where the complainants have complied. *Donnelly Garment Co. v. International Ladies Garment Workers' Union*, 99 F.(2d) 309, 316; *Grace v. Williams*, 96 F.(2d) 478, 481.

The Board apparently admits that the language is jurisdictional but asserts that it does not apply in the present case because the charge was served on February 13 1948, within six months of August 23, 1947, the date when the 1947 amendments became effective.

a. *The Act Grants No Jurisdiction Based on Stale Charges Served Between August 23, 1947, and February 23, 1948.*

The Act, however, gives no support for the contention of the Board that the proviso must be ignored in this case. The amendment to Section 10(b) is simple, clear and direct. It reads:

"No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made."

This prohibition on the issuance of a complaint became effective on August 23, 1947, sixty days after its enactment.<sup>7</sup> We submit that Congress has clearly, simply and directly stated its intent, that it has the power to with-

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7. Labor-Management Relations Act of 1947, Section 104.

draw from the Board jurisdiction over any cases pending before it, and that Congress provided a reasonable period after the enactment of the law during which complaints could have been issued with respect to stale charges if this was deemed necessary to effectuate collective bargaining.

The District Court concluded that a complaint could lawfully issue based upon an unfair labor practice if a charge were filed within six months of the effective date of the 1947 amendments. We submit there is no basis for this conclusion and that the cases cited in no way support that conclusion.

In support of its conclusion, the District Court stated, "Normally, changes of procedure operate in the future and not retroactively; *National Labor Relations Board v. National Garment Co.*, 166 F.2d 233, and *National Labor Relations Board v. Brozen*, 166 F.2d 812." (R. 52). The court apparently misconstrued appellant's position. She does not ask that the 1947 amendment to Section 10(b) be made retroactive; she merely asks that it be made effective on the date that Congress declared it be effective. Her position is entirely different from that taken in opposition to the Board in the cases cited by the District Court. In *Labor Board v. National Garment Co.*, the respondent resisted the Board's enforcement of an order issued prior to the effective date of the 1947 amendments on the patently erroneous ground that the 1947 amendments voided all orders of the Board that had previously been entered but not enforced in court. The court held that the 1947 amendments did not have retroactive effect so as to deprive it of jurisdiction to enforce a Board

order entered prior to the amendments. In *Labor Board v. Brozen*, the respondent sought to prevent enforcement of the Labor Board order dated August 30, 1946. The apparent ground was that the order involved an unfair labor practice occurring more than six months prior to the filing of the charge with the Board. In that case the charge had been filed, the complaint had been issued and the Board had entered its order long prior to the amendments of the Act. The court held that the amendments did not have retroactive effect so as to void an order based on a complaint issued before the law was amended. *In each of the two cases cited the complaint issued long before the 1947 amendments were enacted.*

In the proceeding involved in this appeal, in contrast to the foregoing cases, no complaint was issued before the amendments became effective. The General Counsel purported to issue a complaint many months after the effective date of the 1947 amendments; this clearly contravened the prohibition of Section 10(b) as then in effect.

The District Court also supported its conclusion that the Board had jurisdiction to issue a complaint on the ground that the amendment to Section 10(b) established a limitation on the right to issue complaints and was therefore to be interpreted in violation of its clear language. Thus, it stated,

“Where by statute the time within which the existing right may be exercised is shortened parties affected must be afforded a reasonable time to exercise their remedy. *Rand v. Bossen*, 162 Pac.2d 457; 27 C. 2d 61.” (R. 52)

The holding of the case cited, which is supported therein by a rule stated in *Rosefield Packing Co. v. Superior*

*Court*, 4 C.2d 120, 122, 47 Pae.2d 716, is based upon constitutional guarantees limiting state legislatures, and precluding the impairment of an obligation of a contract or the deprivation of a private right without an adequate remedy. *Rand v. Bossen* further declares,

“What constitutes a reasonable time (within which parties affected may exercise their existing remedies to protect their private rights) is primarily a question for the legislature and a court will not overrule its decision except where palpable error has been committed.” (27 C.2d 61, 66).

*The rule relied upon by the District Court does not apply to an act of Congress. Even if it were applicable, the Congress has provided a reasonable time for issuing complaints; hence its prohibition of jurisdiction was in any event properly and lawfully made effective August 23, 1947, as is provided in Section 104 of the Labor Management Relations Act, 1947.*

First, Congress is not subject to the constitutional limitations that are the basis for the decision of the California state court. There is no limitation upon the power of Congress to cut down or eliminate the jurisdiction of the National Labor Relations Board. Congress has a right, not limited by the Constitution, to withdraw any of the jurisdiction it has granted or to limit it. *Ex parte McCordle*, 7 Wall. 506; *Assessors v. Osbornes*, 9 Wall. 567; *Kline v. Burke Construction Co.*, 260 U.S. 226. These cases uphold the right of Congress to withdraw jurisdiction even where private rights are thereby destroyed and all remedy to enforce them abolished.

With respect to the jurisdiction of the Labor Board, Congress has an even broader right to change the jurisdiction granted. No private rights are created by the National Labor Relations Act; no individual has any vested or constitutional right to relief before the Board. "The Board \* \* \* does not exist for the 'adjudication of private rights'; it 'acts in a public capacity to give effect to the declared public policy of the act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining'." *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 193. Again, the Supreme Court has said, in connection with Labor Board proceedings, "We are dealing here not with private rights." *International Association of Machinists v. Labor Board*, 311 U.S. 72, 80. The Supreme Court has expressly held that no individual has a right to enforce a Board order directing that he be given back pay. "The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions in interstate commerce." *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265. It is furthermore well-established that no individual has a right to compel action before the Labor Board.

"It will be noted that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Act are in existence, none the less we are of the opinion that the Board does not have a cause to complaint to be issued against the employer or proceed to prohibit any unfair labor practices complained of. The course to be

pursued rests in the sound discretion of the Board and is the concern of expert administrative policy.” (*Jacobsen v. Labor Board*, 120 F.2d 96, 100).

Since the Board is merely a creature of Congress and acts simply to protect the public interest, Congress has a complete and unrestricted right to direct the Board to refrain from issuing complaints in any type of unfair labor practice proceedings. Since the Board had jurisdiction to refrain from issuing a complaint on a charge served more than six months after the unfair labor practice, Congress can direct it to refrain. By the 1947 amendments it has exercised this power. It has directed that a complaint shall not issue, and hence that no hearing shall be had, with respect to an unfair labor practice unless a charge has been filed and served within six months of the occurrence of the unfair labor practices. Congress has concluded that it is contrary to the public interest to permit the Board to have jurisdiction with respect to such unfair labor practices. In its sovereign power, it has declared that, effective August 23, 1947, no complaint shall issue under the circumstances involved in the present case.

It is to be noted that Congress did not withdraw jurisdiction in this fashion precipitously. Thus, the amendments provided that they were to become effective 60 days after the passage of the Act. Surely, this 60-day period was a reasonable time within which complaints could have been issued on stale charges. Thus, even if private rights were involved and the 1947 amendments had destroyed them, or withdrawn every remedy for their enforcement, the Congress would have met the

limitations imposed upon state legislatures. In this case, where Congress is not subject to the limitations that were the basis for the decision in *Rand v. Bossen* and where no private rights are involved, the withdrawal of jurisdiction by Congress must be made effective as of the date that Congress declared it should have been made effective. There is no basis for any assertion that the clear language of the statute should be modified by judicial interpretation.

It is thus clear upon the face of the formal papers that the Board has no jurisdiction because the proceeding is based upon a purported complaint issued in violation of the provision of Section 10(b) and so without any supporting statutory authority or jurisdiction.

**2. It Affirmatively Appears on the Face of the Formal Papers of the Board That It Could Not Possibly Have Jurisdiction Because No True Charge Has Ever Been Filed.**

The filing of a charge is the initial procedural step to give jurisdiction to the Labor Board in an unfair labor practice proceeding, such as that to which the subpoena involved herein is ancillary. Section 10(b) of the Act gives the Board power to issue a complaint on an unfair labor practice "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice."<sup>8</sup> This has been held to make the filing of a charge and the issuance of a complaint jurisdictional facts. The Second Circuit Court of Appeals has stated the law in this regard as follows:

"This procedure (the filing of a charge, etc.) is required as a prerequisite to the jurisdiction of the

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8. Section 10(b) is printed in full in footnote 4 above.

Board and the complaint issued and the subsequent hearing must be in accord with the charge in an attempt to prove or rebut such charges."

*Labor Board v. Hopwood Retinning Co.*, 98 F.2d 97, 1010. Therefore, if a charge was not filed, there was no basis for the issuance of a complaint or for the holding of a hearing or for the issuance of a subpoena, because no proceeding has lawfully commenced.

The Board's jurisdiction, if any there be, must stem from the purported charges of January 26, 1948 (R. 31-36). It appears on the face of these papers, that they have been filed by a labor organization, the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, Local 227. It further appears on the face of these documents that they fail to include a statement as to whether it and any national or international labor organization of which it is an affiliate or constituent unit have complied with Section 9(f), (g), and (h) of the Act, and that they fail to contain any reference to the number and expiration date of the letter of compliance issued by the Secretary of Labor. In these respects these documents fail to contain essential allegations required by subsections (e) and (f) of Section 203.12 of the Rules and Regulations of the Board which lays down the requirements of the allegations necessary to constitute a charge.<sup>9</sup>

9. This section of the Board's Rules and Regulations reads:  
"SEC. 203.12 *Contents*.—Such charge shall contain the following:

- "(a) The full name and address of the person making the charge.
- "(b) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.
- "(c) The full name and address of the person against

A document of this type, which fails to satisfy the requirements laid down by the Board's Rules and Regulations as necessary to constitute a charge, is not a

whom the charge is made (hereinafter referred to as the 'respondent').

"(d) A clear and concise statement of the facts constituting the alleged unfair labor practices affecting commerce.

"(e) If the charge is filed by a labor organization, a statement whether it and any national or international labor organization of which it is an affiliate or constituent unit, has complied with section 9(f), (g), and (h) of the act.

"(f) If the charge is filed by a labor organization and if it alleges that it is in compliance with the provisions of section 9(f) and (g) of the act, the number and expiration date of the letter of compliance issued by the Secretary of Labor pursuant to the regulations of the Department of Labor."

Rule 203.13 implements Rule 203.12. It reads:

"Sec. 203.13 *Compliance with section 9(f), (g), and (h) of the act.*—(a) For the purpose of these Rules and Regulations, compliance with section 9(f) and (g) of the act means (1) that the labor organization has a letter of compliance issued by the Secretary of Labor pursuant to the rules of the Department of Labor; and (2) that there is on file with the regional director, either as part of the charge or otherwise, a statement by an authorized representative of the labor organization under oath, that it has such letter, and giving the number and expiration date thereof.

"(b) For the purpose of these rules and regulations, compliance with section 9(h) of the act means that a national and an international labor organization has on file with the general counsel in Washington, D. C., and a local labor organization has on file with the regional director in the region in which the proceeding is pending:

"(1) An affidavit by an authorized representative of the labor organization, under oath, executed contemporaneously with the charge or within the preceding 12-month period, listing the titles of all officees of the organization and stating the names of the incumbents, if any, in each such office and the date of expiration of each incumbent's term.

"(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge or within the preceding 12-month period, stating that he is not a member of the

"charge" within the meaning of the law. The rules referred to above and quoted in the footnote were duly adopted and promulgated. They are lawful. They are within the authority granted the Board in the National Labor Relations Act, as amended, and the Federal Administrative Procedure Act. They were established in accordance with the requirements of the Administrative Procedure Act. They cannot be changed or modified by the Board in the course of deciding a case pending before it. In fact, it cannot be changed without compliance with law which includes at least publication in the Federal Register. *Administrative Procedure Act*, Section 4(a).<sup>10</sup>

The definition of charge stated in the regulations has the force of law. *Maryland Casualty Company v. United States*, 251 U.S. 342. The court there states, at p. 349:

"It is settled by many recent decisions of this court that a regulation by a department of government,

Communist party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods."

10. "Sec. 4(a) *Notice*.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision.” (Citing cases).

See also *Fawcett Machine Co. v. United States*, 282 U.S. 375. The purported charges do not satisfy the law. In the eyes of the law, no charge has been filed.

Since there can be no jurisdiction without a charge, it is clearly and affirmatively apparent upon the face of the formal papers that the Board’s unfair labor practice hearing, and its subpoena ancillary to that hearing, are without the support of even a *prima facie* claim of jurisdiction or statutory authority.

**3. It Affirmatively and Clearly Appears from the Formal Papers of the Board and Upon the Record Before the District Court That the Board Has No Jurisdiction Because the Charging Labor Organization Has Not Complied with Subsections (f), (g), and (h) of Section 9 of the Act, as Amended.**

In addition to limiting the jurisdiction of the Board to those unfair labor practices with respect to which a charge is filed and served within six months, the 1947 amendments also prohibit the issuance of a complaint—and in turn deny jurisdiction—where the charging union fails to submit financial reports to its members and the Secretary of Labor (Act, Sec. 9(f) and (g)).<sup>11</sup> They also

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11. Section 9 of the National Labor Relations Act reads in part:

“(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (e) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and

added subsection (h) to Section 9, which in part reads as follows:

"\* \* \* no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods \* \* \*."

The amendments to Section 9, like the amendment to Section 10(b) discussed above, were enacted on June 23, 1947 and became effective on August 23, 1947.

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any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, \* \* \*"

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection."

These amendments go to the jurisdiction of the Board just as do the requirements that a charge be filed, that a complaint issue and that the charge be served within the time provided. Thus, the Board has no jurisdiction over an alleged unfair labor practice where the charge is made by a non-complying labor organization.

On the face of the formal papers in the Board's proceeding, it appears that the charging labor organization has not complied with these subsections. Thus, the charge (R. 31-36) contains no allegation that there has been compliance although such an allegation is required by the Board's Rules and Regulations.<sup>12</sup> Similarly, the charge fails to allege the number and expiration date of the letter of compliance issued by the Secretary of Labor although this, too, is required by the Rules and Regulations of the Board defining the contents of the charge.<sup>13</sup> Non-compliance is further apparent upon the formal papers from the failure of the complaint to contain the allegations of jurisdictional facts that there has been such compliance.

Non-compliance with the non-Communist affidavit requirement is further apparent upon the face of the formal papers. These show that the charging union is affiliated with the CIO (R. 32, 34, 36). The District Court and this Court may take judicial notice of the fact that the CIO national officers have refused to file the non-Communist affidavits.

Non-compliance is more obvious. Non-compliance by the local officers is admitted by the Board. Thus, the Board

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12. Board's Rules and Regulations Section 203.12(e). This section is printed in full in Footnote 9 above.

13. Rules and Regulations of the Board, Section 203.12(f). This subsection is printed in full in Footnote 9 above.

was requested to admit, and did admit (R. 48, 49), the following facts:

“3. During the period between August 23, 1947, and June 15, 1948—files of the National Labor Relations Board relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572 contained no affidavit satisfying Section 9(h) of the Act—to-wit: that the affiant was not a member of the Communist party or affiliated with such party and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods—signed by any person claiming to be an officer or agent or representative of Local 227 of International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, CIO, other than Eugene J. McCann and Harold A. Bondy.

“4. Eugene J. McCann who had such affidavit on file gives his position as ‘General Super and Trustee, State of California,’ and Harold A. Bondy, who had such affidavit on file, gives his position as ‘Assistant General Super and Trustee, State of California.’

“5. Up to June 15, 1948, the Board’s files relied on by the General Counsel in issuing the complaint in Case No. 20-C-1570, 1571, 1572, contained no affidavit purporting to satisfy Section 9(h) of the National Labor Relations Act signed by a President or Secretary of said Local 227 until, if at all, sometime after June 15, 1948.”

This fact, that there has been no compliance with the non-Communist affidavit requirement, apparent on the face of the formal papers, is confirmed in the record of the Board before the Court. We shall refer to this record

merely to corroborate what appears upon the face of the formal papers.

Prior to the time the appellant herein was served with the subpoena, and thus first became affected by the Board's proceeding, the employers who were participating in that proceeding had raised substantially the same questions with respect to the Board's jurisdiction that are relied upon by the appellant here. The same points were made by the AFL union (Joint Local Executive Board of California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, AFL) that had intervened in the Board's proceeding to oppose granting any relief based on the charges of the CIO union.

At the beginning of the proceeding before the Board, when General Counsel for the Board sought to introduce the purported complaint into the file before the Trial Examiner, the employers objected on the ground there was no showing that there had been compliance with the non-Communist affidavit requirements of law. Thus the counsel for one of the employers stated:

“There is no proof in the proceedings here that the charging party or parties, whichever it may be, have complied with the Communist Affidavit provisions and the information provisions. Until there is proof that that has occurred, there is no showing that the General Counsel had any authority to issue the Complaint. Until there is a showing that the General Counsel had authority to issue the Complaint, there is no basis for proceeding here and there is no basis for accepting in evidence a document which purports to be a complaint.” (R. 38, 39).

This was repeated on June 15:

"Mr. Ernst. Mr. Examiner, before we go into your ruling on the objection, I think there has been no evidence to show that the union involved here has complied with (f), (g), and (h), Section 9, and I wondered if the proper procedure isn't to have that showing, both because of the appearance of Counsel for the union and secondly because the complaint is based upon a charge signed by that union. We have a running objection, I have said, as to the point.

"Trial Examiner Whittemore: It seems to me that you or somebody has raised this question before and it already has been disposed of." (R. 42, 43).

Subsequently, during the hearing, an officer of Local 226, the labor organization that filed the charge, was produced as a witness and counsel for the employer sought to interrogate him with respect to his having filed a non-Communist affidavit. The following colloquy occurred:

"Q. (By Mr. Rowland) Mr. Main, were you at the time of this trouble an officer of Local 227?

A. Yes sir.

Q. Are you an officer now?

A. Yes sir.

Q. Have you filed the non-communist affidavit?

Mr. Leonard. Objected to on the ground it is incompetent, irrelevant, and immaterial.

Trial Examiner Whittemore. I will sustain the objection.

Mr. Rowland. May I inquire at this point, is it the position of the Examiner that we have no right to inquire as to whether or not the affidavits have been filed and whether the charging union here is qualified under the Act?

Trial Examiner Whittemore. Very frankly, Mr. Rowland, I am under the impression that it is neither your business nor my business as to whether or not they have done it. Congress specifically stated it was General Counsel's business, and I frankly don't consider that either you nor I are involved. That is General Counsel's responsibility to see to it that that provision of the Act is lived up to before the complaint is issued." (R. 43)

At this point counsel for the AFL union intervened:

"Mr. McCarthy. And there is no way to test any error of judgment on the part of the General Counsel? We must be bound by that also?

Trial Examiner Whittemore. Well, I have not happened to have run into this particular issue before. I don't know of any—it is an administrative matter." (R. 43, 44).

Subsequently, counsel for the employers sought information as to who were the officers of the charging union and whether affidavits had been filed. Counsel for the union and the General Counsel refused to give any information and the Trial Examiner refused to ask them to give any information to show whether or not the Board had jurisdiction.

"Mr. Ernst. Mr. Examiner, could we ask General Counsel if General Counsel's office will give us the information as to who are the officers of Local 227 and who should have filed affidavits, and if they will give us the information as to when they did? It being our contention that these matters must be disposed of before you can go into the merits of the case.

Mr. Law. Well, we must, of course, refuse. It is our contention that the compliance of the charging union is not a matter for litigation at this hearing."

\* \* \* \*

"Mr. Ernst. \* \* \* I think we are entitled to get an answer from General Counsel and C.I.O. whether they are going to help us; secondly, if they are not, whether the Trial Examiner will ask General Counsel and Counsel for the C.I.O. to give us any information on that. Can't we have simple answers to those questions?

Mr. Law. You have our answers already.

Trial Examiner Whittemore. You have answers to the questions from two individuals to whom you have raised them. You have not raised them to the Trial Examiner as yet.

Mr. Ernst. We hereby request the Trial Examiner to request General Counsel and Counsel for the C.I.O. to procure that information.

Trial Examiner Whittemore. I regret to inform you I must decline." (R. 44-45).

On June 22, 1948, the General Counsel produced as a witness the employee of the Board who had control over the file in the proceeding. Counsel for the employers sought to question her with respect to whether affidavits were on file. The following occurred:

"Q. (By Mr. Kuchman) And what is the significance of the docket number? Does it represent a file?

A. Yes, it does.

Q. And does the file then contain all of the papers pertaining to that proceeding?

A. Yes, it does.

Q. Is it indicated in that docket whether or not affidavits had been filed by the charging Union, on

behalf of its officers, that they are not members of the Communist Party?

Mr. Magor. I object to that question on the grounds it is incompetent, irrelevant and immaterial to the issues in this case, wholly apart from the direct examination.

Trial Examiner Whittemore. I will sustain the objection.

Mr. Ernst. Well, Mr. Examiner, they brought the person in here to testify and apparently they have written consent from the General Counsel for the witness to testify as to what she does and what are in her records and what are in their files. They have opened it up on direct examination, they have got the written authority to put her on, and I think we are entitled to go into everything that is in the files under her control.

Mr. Magor. It is a wholly collateral attack.

Trial Examiner Whittemore. I see no reason to reverse my ruling." (R. 45, 46).

The foregoing quotations demonstrate an utter refusal, not merely a neglect, to show any legal and factual basis for assuming jurisdiction in the proceeding. It shows that no complaint could lawfully issue because the charging union has not complied with subsections (f), (g), and (h) of Section 9. This further shows that General Counsel for the Board has consistently blocked the employers' efforts to present testimony on jurisdiction. Apparently to protect itself against further proof of the utter lack of jurisdiction, the office of the General Counsel has withheld the official records that corroborate it.

The face of the formal papers, corroborated by the record, show that the charging union had not complied

with subsections (f), (g), and (h) of Section 9 and hence that there was no authority to issue a complaint or any jurisdiction to conduct the hearing.

**4. It Affirmatively and Clearly Appears on the Face of the Formal Papers of the Board That the Facts Necessary to Give the Board Jurisdiction in Its Proceeding Have Not Been Alleged.**

It is well established that a tribunal of limited jurisdiction has no statutory authority or jurisdiction to carry on a proceeding unless the formal papers, upon which it is founded, include allegations of the necessary jurisdictional facts. This is true not only of administrative tribunals, but even of the federal courts. Thus the Supreme Court has stated in *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189:

“\* \* \* The party who seeks the exercise of jurisdiction in his favor \* \* \* must allege in his pleading the facts essential to show jurisdiction. If he fails to make the necessary allegations he has no standing \* \* \* If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.”

See also *Hull v. Burr*, 234 U.S. 712; *Gully v. First Nat'l Bank*, 299 U.S. 109; *KVOS, Inc. v. Associated Press*, 299 U.S. 269; *Thompson v. Moore*, 109 F.2d 372; *Brown v. Coumanis*, 135 F.2d 163. In the absence of distinct averments of the necessary jurisdictional facts, the Board —just like a federal court—has no jurisdiction to proceed.

The failure to allege the facts that were made jurisdictional by the 1947 amendments to the Act is obvious.

Specifically, there is no allegation that the officers of the charging union have each on file the necessary affi-

davits; it is submitted that such an allegation would be contrary to the fact. There is no allegation that the charging union has furnished the required financial reports; the facts as to this are unknown to respondent. There is no allegation that a charge was served on any of the respondents, much less that it was served within six months of the alleged unfair labor practices; General Counsel bases his case on service on February 13, 1948, eighteen months after the alleged unfair labor practices.

The failure of the complaint to contain the necessary allegations of the jurisdictional facts makes it clearly apparent that the Board has no jurisdiction to proceed and therefore had no authority or jurisdiction to issue the subpoena.

**5. The Formal Papers of the Board Upon Which Its Claim to Jurisdiction Depends Do Not Include a Lawfully Issued Complaint.**

As has been shown above, the purported complaint (R. 24-36) affirmatively shows that it is not a true complaint because it shows on its face that there was no authority or jurisdiction to issue it. Section 9 and Section 10(b) both expressly provide that a complaint shall not issue where the facts are as stated in the purported complaint relied upon by the Board. Hence, as it is well established that a complaint must lawfully issue before the Board can have jurisdiction to proceed,<sup>14</sup> the Board proceeded without any claim of jurisdiction in ordering its hearing and in issuing the subpoena the Board seeks to have enforced.

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14. See a discussion of this on pages 19 to 22.

**B. A COURT MUST REFUSE TO ENFORCE A SUBPOENA ISSUED BY AN ADMINISTRATIVE BOARD IN THE COURSE OF A PROCEEDING THAT IS AFFIRMATIVELY AND CLEARLY SHOWN TO BE WHOLLY OUTSIDE THAT BOARD'S JURISDICTION.**

Appellant contends that the District Court should have refused to enforce the subpoena in order to protect the witness against the Board's abuse of the subpoena power in violation of the Constitution and statutes and in order properly to exercise the discretion granted it by Section 11(2) of the Act.<sup>15</sup> The Board contends that the appellant, a stranger to the Board's proceeding, must be compelled to testify even though it clearly and affirmatively appears upon the face of its own formal papers that the Board could have no possible jurisdiction in the hearing. In short, the Board contends that the court should enforce the subpoena simply because the Board has decided to hold a hearing and issue a subpoena.

The contention of the Board would give no individual any right to defend against an administrative subpoena. However, the law expressly guarantees the right to defend against unlawful exercise of the subpoena power. Thus, the

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15. Section 11(2) of the National Labor Relations Act gives the District Court jurisdiction to issue an order requiring compliance with a subpoena, which reads as follows:

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

Supreme Court stated in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 49:

"The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defense may be made."

We submit that Congress has given the courts discretionary jurisdiction to enforce the Board's subpoenas so that citizens, such as the appellant before this Court, may be protected against abuse in the exercise of the subpoena power. The subpoena power is in any case a drastic one. Any exercise of it infringes on the liberty and freedom of the witness subpoenaed. Its indiscriminate use can constitute such a severe interference with the rights of private citizens as to amount to persecution. For these reasons the courts have kept its use within well-defined channels. Cf. *Boyd v. United States*, 116 U.S. 616; *Hale v. Henkel*, 201 U.S. 43; *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298; *Cudahy Packing Co. v. Holland*, 315 U.S. 357, 363.

The private citizen's right of privacy against the government is stated by Mr. Justice Brandeis dissenting in *Olmstead v. United States*, in which he and Holmes, Stone, and Butler, JJ., dissented. He stated, at 277 U.S. 438, 478-479:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfaction of life are to be found in material things."

They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. *They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.* To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.” (Italics added.)

Surely a subpoena without a shred of jurisdiction to support it is an unreasonable, arbitrary and unjustifiable violation of the “right to be let alone” which the Constitution confers to individuals “as against the Government.” It is well established that an exercise of the subpoena power, to be constitutional must be reasonable. *Lasson, Development of the Fourth Amendment to the United States Constitution, 1937; Interstate Commerce Commission v. Brimson, 154 U.S. 447; Hale v. Henkel, 201 U.S. 43, 76; Boyd v. United States, 116 U.S. 616, 630, 634, 635.* It is thus apparent that the appellant has appropriate Constitutional defenses against the enforcement of the subpoena and that the District Court violated her constitutional rights when it ordered enforcement.

To enforce the instant subpoena is furthermore to violate Section 6(c) of the Administrative Procedure Act.<sup>16</sup> This section provides that the subpoena of an ad-

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16. Section 6(c) of the Administrative Procedure Act provides:

“Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of

ministrative board shall be enforced only "to the extent that it is found to be in accordance with law." This provision was explained in the language of the Senate Report accompanying it as "a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction" and to require the courts to "inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction" before enforcing any subpoena. Here it is obvious from the most cursory examination of the proceeding that the Board cannot possibly find it has jurisdiction.

The meaning of this provision of the Administrative Procedure Act may be clarified by consideration of the Constitutional rules established by the Supreme Court in administrative subpoena cases. The nature of the individual's right to be free of abuse of the subpoena power was stated by the Supreme Court in *Jones v. Securities &*

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procedure, upon a statement of showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

The Senate Report, No. 752, on the Administrative Procedure Act, provides:

"The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction."

*Exchange Commission*, 298 U.S. 1. Without dissent on this issue, the Court stated, at page 25:

“An official inquisition to compel disclosures of fact is not an end, but a means to an end; and it is a mere truism to say that the end must be a legitimate one to justify the means. *The citizen, when interrogated about his private affairs, has a right before answering to know why the inquiry is made; and if the purpose disclosed is not a legitimate one, he may not be compelled to answer.*” (Italics added.)

The nature and scope of this right of the individual has more recently been considered by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186. In that case the court stated, “Officious examination can be expensive, so much so that it eats up men’s substance. It can be time consuming, clogging the processes of business. It can become persecution when carried beyond reason.” The Court further stated that there must be a “basic compromise” between the public interest and the individual’s private right to be let alone, and “\* \* \* the basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are not identical with those protected against invasion by actual search and seizure, nor are the threatened abuses the same. *They are rather the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law.*” (327 U.S. 186, 213)

The appellant has shown that the Board is flagrantly guilty of officious intermeddling in seeking to compel her

to come into this proceeding and testify. In five separate particulars, appellant has demonstrated that the Board has affirmatively shown on its own formal papers and by its own actions that it could not possibly have jurisdiction. Each one of them separately proves that the subpoena was issued in excess of the Board's statutory authority and was irrelevant to any lawful purpose. In such a proceeding, the appellant properly refused to testify before the Board, for it is well established that one need not submit to a demand that he testify "if in any respect it is unreasonable or overreaches the authority Congress has given." *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217.

Virtually the exact facts that are involved in this case were used as an example of an abuse of the subpoena power in *Endicott-Johnson Corp. v. Perkins*, 128 F.(2d) 208. In this case the court stated, at page 215:

"When \* \* \* a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena."

Again it stated (128 F.2d 208, 224):

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with in-

terstate commerce, no court could properly order compliance with the subpoena \* \* \*.”

In the present case the formal papers before the Board do show that interstate commercee is involved. But these same papers, which are before the Court as appendices to the pleadings of the Board, affirmatively show that the jurisdictional facts under the 1947 amendments do not exist. Thus “a lack of all possible statutory authority to compel the witnesses to answer” is apparent on the very face of the record. We submit the law requires the District Court to have refused to order compliance with the Board’s subpoena.

Essentially the same condition as is present in this case was, in the opinion of the majority of the Supreme Court, present in *Jones v. Securities and Exchange Commission*, 298 U.S. 1. Here the majority of the court concluded that the administrative investigation there involved “had ceased to be legitimate” and the “inquiry necessarily came to an end.” While there was a disagreement as to whether this was the fact, the court agreed that if there were no legitimate and lawful proceeding under way and it had ceased to be, the administrative subpoena was not to be enforced. On this point, the court stated:

“Since here the only disclosed purpose for which the investigation was undertaken had ceased to be legitimate when the registrant rightfully withdrew his statement, the power of the commission to proceed with the inquiry necessarily came to an end. Dissociated from the only ground upon which the inquiry had been based, and no other being specified, further pursuit of the inquiry, obviously, would become what Mr. Justice Holmes characterized as ‘a fishing expedi-

tion \* \* \* for the chance that something discreditable might turn up' (*Ellis v. Interstate Commerce Comm'n*, 327 U.S. 434, 445)—an undertaking which uniformly has met with judicial condemnation. *In re Pacific Ry. Comm'n*, 32 Fed. 241, 250; *Kilbourn v. Thompson*, 103 U.S. 168, 190, 192, 193, 195, 196; *Boyd v. United States*, 116 U.S. 616; *Harriman v. Interstate Commerce Comm'n*, 211 U.S. 407, 419; *Federal Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298, 305-307."

In the present case, the Board never had jurisdiction; its hearing never became legitimate; it has never lawfully commenced. Consequently, there is no basis for judicial enforcement of a subpoena. It is without any possible statutory authority.

The appellant, a stranger whose only interest in the Board's proceeding arises out of the service of the subpoena upon her, has asked the courts to refuse to require her to testify. She asks protection in her right to be left alone and to be free of the unjustifiable intrusion upon her privacy. She wishes to enjoy her liberty and freedom to do as she may wish. She protests the attempt to deprive her of it without due process of law. She has sought to determine why the Board is carrying on its inquiry and the basis of its assertion of jurisdiction to issue the subpoena. It appears on inquiry limited to the face of the formal papers, that for several separate reasons the Board cannot possibly have any jurisdiction. Absence of jurisdiction and statutory authority—and so due process of law—could not be more obvious. If the subpoena involved in this case is to be enforced, there is no Constitutional or statutory limit on the Board's exercise of the subpoena power.

**CONCLUSION**

The present case, we submit, is a flagrant and outrageous abuse of the subpoena power by a board that is clearly acting outside its jurisdiction and that refuses even to go through the formalities of claiming jurisdiction or to make a pretense of supporting it. This court, we respectfully submit, should reverse the District Court and direct that the application to enforce the subpoena be denied and the order to show cause be quashed.

Dated: San Francisco, California, May 14, 1949.

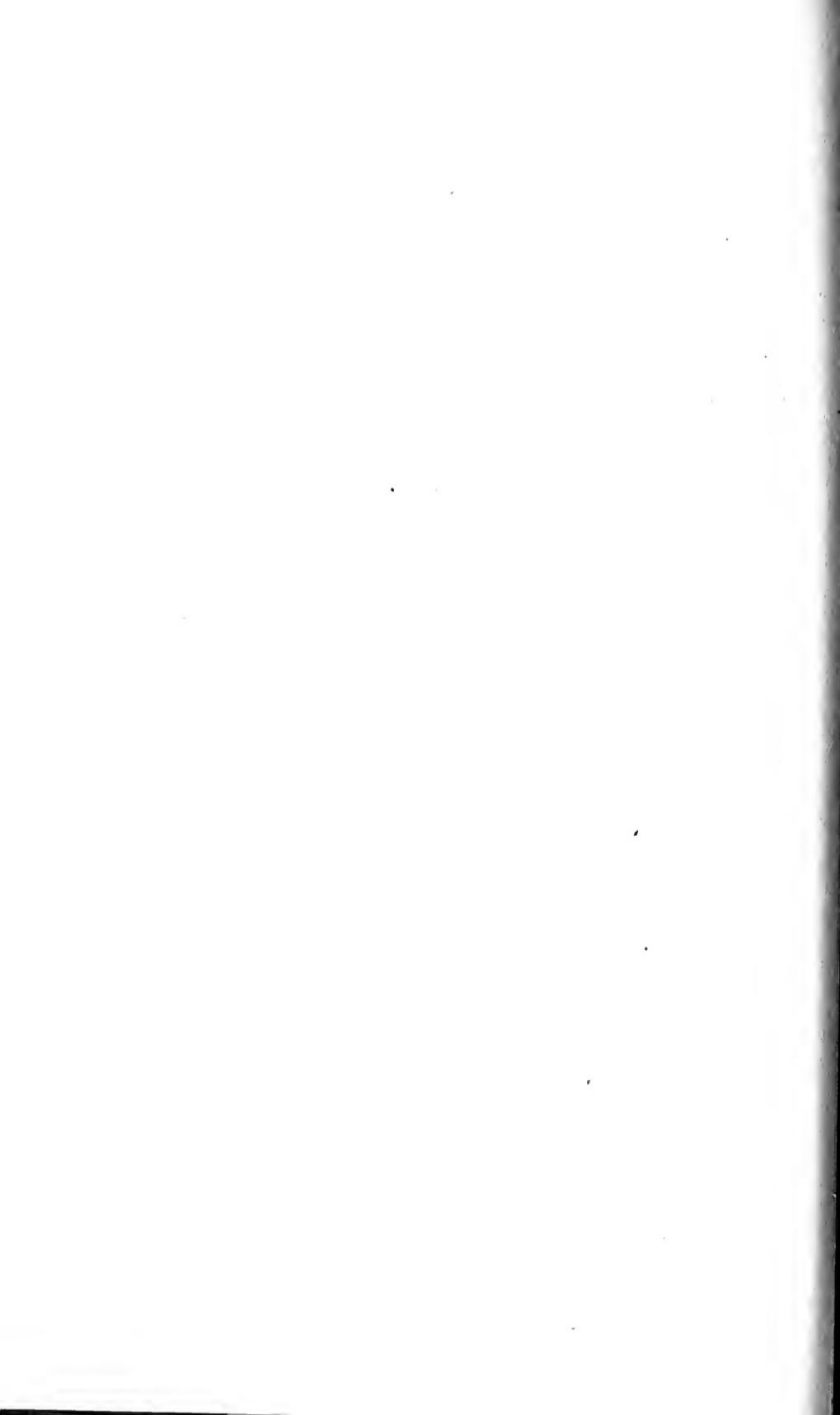
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RICHARD ERNST

*Attorneys for Appellant*



No. 12197

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In the United States Court of Appeals  
for the Ninth Circuit

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LOUISE HAMILTON, APPELLANT

v.

NATIONAL LABOR RELATIONS BOARD, APPELLEE

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN  
DIVISION.

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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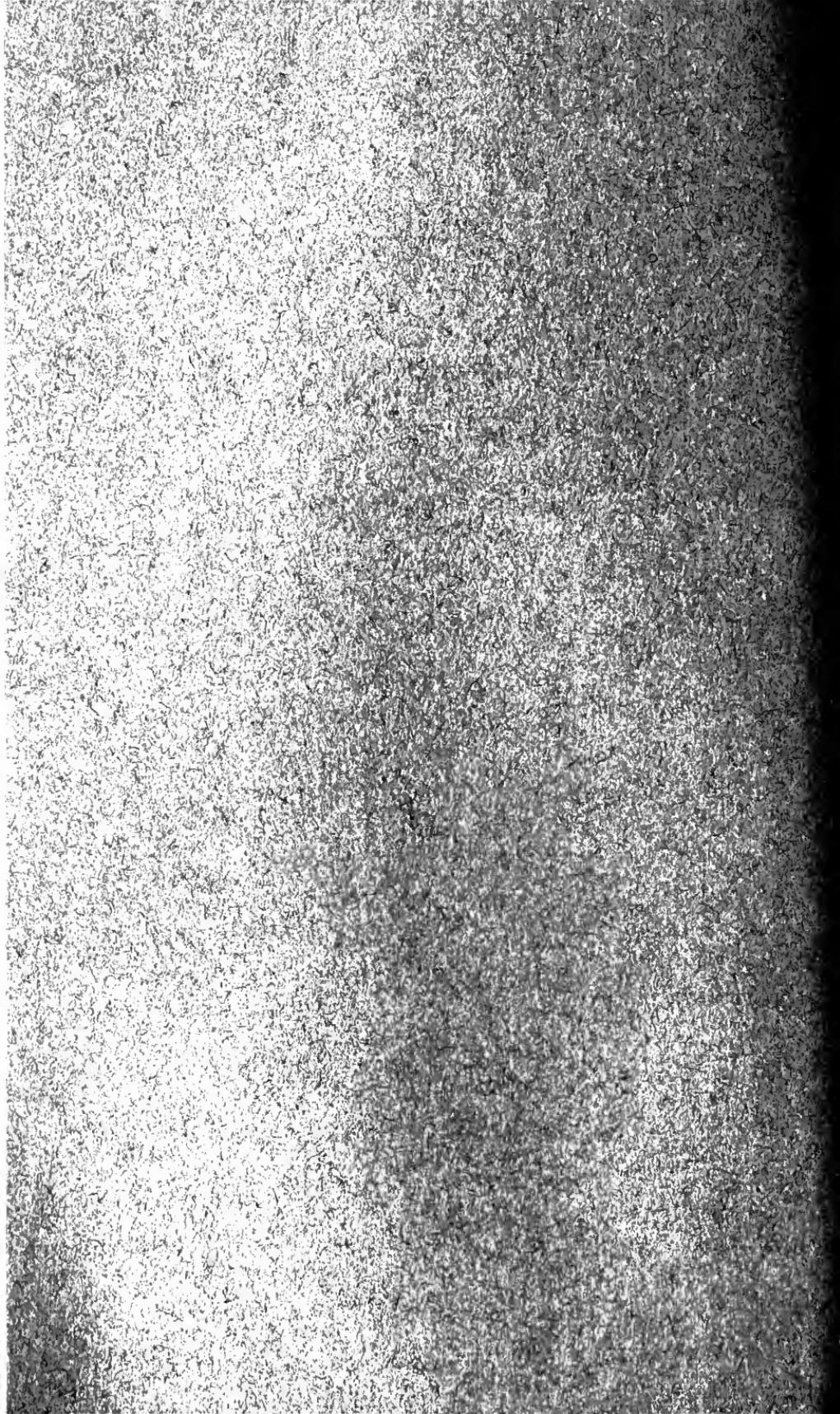
*National Labor Relations Board,*

*Washington 25, D. C.*

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A. S. YERKIN, CLERK



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**In the United States Court of Appeals  
for the Ninth Circuit**

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No. 12197

**LOUISE HAMILTON, APPELLANT**

*v.*

**NATIONAL LABOR RELATIONS BOARD, APPELLEE**

---

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN  
DIVISION**

---

**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD**

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**JURISDICTION**

This is an appeal from an order of the district court for the Northern District of California requiring the appellant to comply with a subpoena *duces tecum* issued by the National Labor Relations Board pursuant to Section 11 (1) of the National Labor Relations Act as amended (61 Stat. 136, 29 U. S. C. Supp. I (1947) 151 et seq.) hereinafter referred to as the Act.<sup>1</sup> As shown by the Board's application for the order (R. 1-8), the jurisdiction of the district court was invoked pursuant to Section 11 (2) of the Act. The jurisdiction of this Court is invoked pursuant to § 28 U. S. C. 1291. The order from which the appeal is taken was entered on January 17, 1949 (R. 55).

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<sup>1</sup> The relevant portions of the Act are printed in appendix A, *infra* p. 24 et seq.

The notice of appeal was filed on January 26, 1949 (R. 56).

#### STATEMENT OF THE CASE

On January 26, 1948, pursuant to Section 10 (b) of the Act, the International Union of Brewery, Flour, Cereal and Soft Drink Workers of America, Local 227,<sup>2</sup> hereinafter referred to as the Union, filed with the Board second amended charges against several employers alleging that they had, in July and August, 1946, engaged in unfair labor practices within the meaning of Sections 8 (1) and (3) of the Act by discharging some 26 employees because of their membership in the Union (R. 31, 33, 35). Among the employers named in the second amended charges was the Ranier Distributing Co., a copartnership consisting of A. Levy and J. Zentner Co., a California corporation and several individuals (R. 35). The second amended charges were served upon the employers on February 10, 1948 (R. 21).<sup>3</sup>

On April 26, 1948 the General Counsel of the Board made and entered an order consolidating the cases against the several employers (R. 24), and on the same day issued a complaint charging the employers with the unfair labor practices referred to in the second amended charges filed by the Union (R. 26).<sup>4</sup> The

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<sup>2</sup> The International Union is affiliated with the Congress of Industrial Organizations.

<sup>3</sup> The original charges were served many months before.

<sup>4</sup> The complaint alleges that on or about December 31, 1946, A. Levy and J. Zenter Co., acquired the interests of its copartners in the Ranier Distributing Co., and thereafter conducted the business of that partnership under the name of Valley Beverage Company as the successor thereof (R. 27).

employers having answered the complaint, a hearing was begun before a Trial Examiner of the Board at Sacramento, California, on January 14, 1948 (R. 3, 16). On June 23, 1948, a subpoena *duces tecum* was issued by a member of the Board requiring appellant, Louise Hamilton, to appear and testify before the Trial Examiner and to produce certain books, records and documents of A. Levy and J. Zentner Co., in her possession as bookkeeper of that concern (R. 5, 17). The relevancy and competency of the evidence, oral and documentary, sought to be secured by the subpoena, as well as appellant's ability to produce the books, records and documents demanded, are conceded (R. 18).

In accordance with the Rules and Regulations of the Board, appellant appeared specially before the Trial Examiner and moved to quash the subpoena on the ground that the Board was without jurisdiction to entertain the proceedings in aid of which it was issued because the second amended charges on which the complaint was based were filed and served more than six months after the occurrence of the alleged unfair labor practices, and because it did not appear from the complaint or otherwise that the Union and its officers had complied with the requirements of Sections 9 (f) (g) and (h) of the Act and because the Trial Examiner had excluded evidence as to whether or not the Union and its officers had complied with the sections mentioned (R. 9-12). The motion was overruled, and appellant on the advice of counsel refused to testify or to produce the books, records and documents demanded by the subpoena (R. 6, 17).

Thereupon the Board filed with the district court, pursuant to Section 11 (2) of the Act, an application for an order requiring appellant to comply with the subpoena (R. 1). To this application appellant filed an answer in which she asserted that the Board was without authority to conduct or entertain the proceedings in aid of which the subpoena was issued, and therefore without authority to issue the subpoena, because the second amended charges were filed and served more than six months after the occurrence of the alleged unfair labor practices on which the proceedings were based and because the labor organization which filed the charges and its officers had failed to comply with the requirements of Sections 9 (f) (g) (h) of the Act, and that if she were compelled to comply with the subpoena her rights under the Fourth and Fifth Amendments to the Constitution would be invaded (R. 12-23). The Court in a written opinion (R. 5054) held that there had been timely service of the amended Charges (R. 52) and held that in any event the issues raised by appellant could not be litigated in a proceeding under Section 11 (2) of the Act to compel obedience to a subpoena it accordingly entered an order (R. 55) requiring the appellant to comply with the subpoena. From this order appellant has appealed.

#### **ARGUMENT**

##### **I**

**Appellant being a witness and not a party in the proceeding before the Board is without standing to challenge the Board's jurisdiction over the particular case before it**

It is conceded that the evidence, oral and documentary, sought by the subpoena is material and com-

petent (R. 18). It is also conceded that appellant can comply with the subpoena by giving and producing the evidence which it demands (R. 18). It is clear, if not expressly conceded, that the documentary evidence which the subpoena requires appellant to produce is not her property. The owner of that evidence, appellant's corporate employer, is not a party to this appeal or to the proceeding in the Court below. Appellant is not a party to the proceedings before the Board. Her only relation to those proceedings is that of a witness. The only excuses which she gives for not complying with the subpoena is that those proceedings are barred by the statute of limitations and that the Board is precluded from conducting and entertaining them at the instance of the Union.

These are objections which appellant, as a witness, is without standing to raise. They relate to matters which are no concern of hers. A witness has never been permitted to refuse to give evidence because the action is barred by the statute of limitations, or because the complaining party is precluded from invoking the jurisdiction of the tribunal. *Nelson v. United States*, 201 U. S. 92, 115; *Bevin v. Krieger*; 289 U. S. 459, 463-464; *Fairfield v. United States*, 146 F. 508, 509 (C. A. 8).

Even if appellant's objections to the enforcement of the subpoena went to the jurisdiction of the Board to entertain the proceedings in which the subpoena was issued (which as we shall presently show is not the case, see *infra*, p. 10), Appellant does not have the necessary standing to assert them. This is made manifest by the authorities.

A leading case is *Blair v. United States*, 250 U. S. 273. The appellants in that case were witnesses who had been called before a grand jury in the Southern District of New York in an investigation concerning violations of the Corrupt Practices Act of June 25, 1910 (36 Stat. 622) in connection with the verification and filing in that district of reports to the Secretary of the Senate of the United States, made by a candidate for nomination as Senator at a primary election held in the State of Michigan, on August 27, 1918. They appeared but declined to answer questions on the ground, as they claimed, that there was no jurisdiction in a court and grand jury of the Southern District of New York to inquire into the conduct of a campaign in Michigan for the nomination of a United States Senator; that the Federal Corrupt Practices Act, as amended was unconstitutional; and that no federal court or grand jury in any state had constitutional authority to conduct an inquiry regarding a primary election for the nomination of a United States Senator. Upon refusal to answer they were held guilty of contempt and remanded to the custody of the marshall. The case came up to the United States Supreme Court on a writ of error and an appeal from a decision of the district court dismissing a writ of habeas corpus sued out by the appellants for their release. The court affirmed the judgment of the district court.

The court said (250 U. S. p. 278) :

It is maintained further that, because of the invalidity of these statutes, neither the United States district court nor the federal grand jury

has jurisdiction to inquire into primary elections or to indict or try any person for an offence based upon the statutes, and therefore the order committing appellants is null and void.

We do not think the present parties are so entitled, since a brief consideration of the relation of a witness to the proceeding in which he is called will suffice to show that he is not interested to challenge the jurisdiction of the court or grand jury over the subject-matter that is under inquiry.

After reciting the historical basis for the power of compulsory process to require witnesses to appear and give evidence, the court said (p. 282) :

On familiar principles, he is not entitled to challenge the authority of the court or of the grand jury, provided that they have a *de facto* existence and organization.

And for the same reasons, witnesses are not entitled to take exception to the jurisdiction of the grand jury or the court over the particularly subject matter that is under investigation. In truth it is in the ordinary case no concern of one summoned as a witness whether the offense is within the jurisdiction of the court or not.

The doctrine established by the *Blair* case *supra*, has been consistently followed and approved. *United States v. McGovern*, 60 F. 2d 880 (C. A. 2); *United States v. Watson*, 266 F. 736 (D. C. N. D. Fla.). It is not confined to grand juries but extends to all lawfully created tribunals including administrative bodies. *Howat v. Kansas*, 258 U. S. 181, 186 (Kansas Court of Industrial Relations); *Perkins v. Endicott Johnson Corp.*, 128 F. 2d 208, 213, 214 (C. A. 2),

affirmed 317 U. S. 501 (Secretary of Labor); *Brownson v. United States*, 32 F. 2d 844, 847 (C. A. 8) (Commissioner of Internal Revenue); *United States v. Government of Germany*, 5 F. Supp. 97, 99 (E. D. N. Y.) (Mixed Claims Commission).

The case of *Howat v. Kansas, surpa*, is particularly in point. There the plaintiffs in error were adjudged in contempt by a state court for failing to obey its order to comply with a subpoena issued by the Industrial Court of Kansas, which although called a court was in fact an administrative board acting under subpoena powers similar to those of the Board here.<sup>5</sup> They sought reversal of the judgment of contempt, which had been affirmed by the Supreme Court of Kansas, on the ground that the statute creating the Industrial Court was unconstitutional. Affirming the judgment the Supreme Court said with reference thereto (258 U. S. at p. 186):

It would seem to be sustained also by the decision of this court in *Blair v. United States*, 250 U. S. 273, wherein it was held that a witness summoned to give testimony before a grand jury in the District Court of the United States was not entitled to refuse to testify when ordered by the Court to do so upon the plea that the court and jury were without jurisdiction over the supposed offense under investigation because the statute denouncing the offense was unconstitutional.

The foregoing authorities make it clear, we submit, that appellant is without standing to resist enforce-

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<sup>5</sup> 258 U. S. at p. 184.

ment of the subpoena on the grounds that she asserts on this appeal. The only excuses which she may, as a witness, rightfully urge for refusing to obey the subpoena admittedly do not exist. These are that the subpoena was not issued in accordance with the statute, that compliance therewith will violate appellant's personal privilege against self-incrimination or that the subpoena is so vague or broad as to be the equivalent of an illegal search<sup>6</sup> *Perkins v. Endicott Johnson Corporation*, 128 F. 208, 213 (C. A. 2), affirmed 317 U. S. 501. It is not contended that the subpoena was not issued in accordance with the statute. The evidence required to be produced consists of corporate records. The privilege against self-incrimination therefore does not apply. *United States v. White*, 322 U. S. 694, 699; *Bowles v. Northwest Poultry & Dairy Products Co.*, 153 F. 2d 32, 34 (C. A. 9). And it is conceded that the evidence is relevant and that appellant has the power to produce it. The Constitutional guaranty against unlawful searches and seizures is, therefore, equally inapplicable. *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 208-209. It necessarily follows, therefore, that appellant is without standing to resist compliance with the subpoena.

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<sup>6</sup> As the Court of Appeals for the Eighth Circuit said in *Fairfield v. United States*, 146 F. 508, 509, the witness' "personal privileges and a gross abuse of the process of the court are the only sufficient excuses for his failure to obey."

## II

The authority of the Board to conduct the proceeding in which the subpoena was issued cannot be litigated in this case

Even if appellant had the requisite standing to assert the defenses which would be available to her employer, the Board's right to have the subpoena enforced cannot be defeated on any of the grounds urged by appellant on this appeal. The only reason which appellant advances why enforcement of the subpoena should be denied is that the Board lacked jurisdiction to conduct the proceeding in aid of which the subpoena was issued. She bases this contention on three grounds, first, that the administrative proceeding before the Board was not seasonably instituted; secondly, that the Union was without standing to invoke the processes of the Board because of the alleged failure of itself and its officers to comply with the requirements of Sections 9 (f) (g) and (h); and thirdly, that neither the pleadings nor the proof in the administrative proceedings before the Board showed that the charge which the Union filed had been filed and served within the time limited by Section 10 (b) or that the Union and its officers had complied with Sections 9 (f) (g) and (h) of the Act. These are objections which do not go to the jurisdiction or authority of the Board at all but pertain solely to the merits.<sup>7</sup> *General*

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<sup>7</sup> Appellant's reliance upon *Donnelly Garment Co. v. International Ladies Garment Workers' Union*, 99 F. 2d 309, 316 (C. A. 8) and *Grace v. Williams*, 96 F. 2d 478, 481 as tending to show that the requirements of the proviso of Section 10 (b) and Section 9 (f), (g) and (h) are jurisdictional is misplaced. Both decisions involved the Norris-La Guardia Act, the express purpose of which, as its title shows, was to limit the jurisdiction of the district

*Investment Co. v. New York Central R. Co.*, 271 U. S. 228, 231; *Foltz v. St. Louis & S. F. Ry. Co.*, 60 F. 316 (C. A. 8); *Shodde v. United States*, 69 F. 2d 866, 868 (C. A. 9). But whether they go only to the merits or to the jurisdiction of the Board, they raise issues of law and fact which the Board has the power to decide and in fact must decide in the course of the administrative proceeding, subject to the judicial review by the appropriate Court of Appeals in proceedings brought under Section 10 (e) or (f) of the Act.<sup>8</sup>

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courts. Other statutes similar in language to the statutory provisions which appellant seeks to invoke have been held not to be jurisdictional. *Allen v. Regents*, 304 U. S. 439, 449; *Smith v. Apple*, 264 U. S. 274, 278, 279.

<sup>8</sup> Respondent's position would not be improved even if the merits were in issue. For example, with respect to the question whether the administrative proceeding was seasonably begun, the formal records of the Board show that the original charge was filed by the Union in September 1946. At that time there was no time limitation prescribed by the Act for the filing of charges nor was it necessary for a union in order to invoke the Board's processes to comply with the requirements now prescribed by Section 9 (f), (g), and (h). It is well settled that although a charge is necessary to set the machinery of an inquiry in motion it is not even a pleading (*N. L. R. B. v. Indiana & Michigan Electric Co.*, 318 U. S. 9, 17) and that once a charge is filed the Board's jurisdiction attaches and is not defeated or impaired by the subsequent withdrawal of the charge. *N. L. R. B. v. General Motors Corporation*, 116 F. 2d 306, 312 (C. A. 7); *N. L. R. B. v. Federal Engineering Co.*, 153 F. 2d 233 (C. C. 6).

Again, even if there had been no service of the charge before the effective date of the 1947 amendments to the Act, on the basis of the well-established doctrine that a newly enacted statute of limitations operates prospectively only, service of the charge within 6 months after the effective date of the amendment was for the reasons stated by the Court below (R. 52), timely in any event. See also *Carscadden v. Alaska*, 105 F. 2d 377 (C. A. 9).

Furthermore, as to the question whether the requirements of Section 9 (h) have been met, affidavits on file with the Board

Such issues, even though they may be said to be jurisdictional, cannot be litigated in subpoena enforcement proceedings. This has been settled at least since the Supreme Court's decision in *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501. In that case the Secretary of Labor issued a subpoena in aid of an administrative proceeding which had been begun under the Walsh Healey Act. Compliance with the subpoena having been refused, the Secretary applied to the District Court for an order to enforce it. The District Court denied the application because it was of the opinion that the Secretary was not authorized to conduct the administrative proceeding because the defendant was not covered by the Act under which the Secretary was proceeding. In affirming the decree of the Court of Appeals, which reversed the judgment of the district court, the Supreme Court held the question of the Secretary's jurisdiction was not an issue which could be raised in subpoena enforcement proceedings. In so doing the Court said:

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show that all of the officers of the International Union have complied with that Section and that the officers of the local union had been removed by the International Union in accordance with the Constitution and Bylaws of that organization and had been superseded by officers appointed by the International Union who have complied with Section 9 (h). As to whether or not the Union had complied with Section 9 (f) and (g), a certificate issued by the Secretary of Labor shows that it has.

We mention the facts in this note not for the purpose of meeting appellant's contentions on the merits but primarily to show that they raise issues of law and fact which are determinable within the administrative proceeding only and not collaterally in a special statutory proceeding in aid of the administrative inquiry.

Nor was the District Court authorized to decide the question of coverage itself. The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration. \* \* \*

The petitioner has advanced many matters that are entitled to hearing and consideration in its defense against the administrative complaint, but they are not of a kind that can be accepted as a defense against the subpoena (317 U. S. at p. 509).

This ruling was reaffirmed by the Supreme Court in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, and has been consistently followed by all the Courts of Appeals which have considered the matter; *N. L. R. B. v. Northern Trust Co.*, 148 F. 2d 24, 27 (C. A. 7); *N. L. R. B. v. Barrett Co.*, 120 F. 2d 583 (C. A. 7); *Cudahy Packing Co. v. N. L. R. B.*, 117 F. 2d 692 (C. A. 10).

In adopting the Administrative Procedure Act Congress enacted into positive law the rule laid down by the Supreme Court in the *Endicott-Johnson* case. As originally introduced, the proposed Section 6 (c) of the bill which upon enactment became the Administrative Procedure Act provided in pertinent part as follows:

Upon any contest of the validity of a subpoena or similar process or demand the Court shall determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency, and in any proceeding

for enforcement shall enforce (by the issuance of an order requiring the production of the evidence or data under penalty of punishment for contempt in case of contumacious failure to do so) or refuse to enforce such subpoena accordingly.

Both the Attorney General and the Board protested to the appropriate Congressional Committees against this provision which would make the jurisdiction or authority of the agency a litigable issue in subpoena enforcement proceedings. The Attorney General in his comments on the bill said:

Particular note should be had of the requirement that upon resort to the Court for enforcement of a subpoena, the court shall determine all questions of law raised by the parties including the agency's authority or jurisdiction in law or in fact. By this provision the bill overrules the recent decision in *Endicott-Johnson* (63 S. Ct. 339), in which the court explicitly held that the question of jurisdiction of the agency is not normally open to the courts in a subpoena enforcement case. A rather fundamental question of administrative policy and procedure is involved in the issue. If an agency's jurisdiction can first be tested through the courts before the agency can proceed to final decision the doctrine of *Myers v. Bethlehem Shipbuilding*, 303 U. S. 41, is effectively defeated. The result is piecemeal litigation and delay while the case must go through the courts not once but twice. In cases where the question of jurisdiction is in the first instance for the agency to decide, every reason of orderly administrative procedure calls for leaving the sit-

uation where it is left by the *Endicott-Johnson* case. It would be extraordinarily burdensome to call for a court trial on the issue of jurisdiction as a preliminary to the agency's going forward with its own hearing. This does not leave the court as a rubber stamp; as the Supreme Court observed in the *Endicott-Johnson* case, constitutional issues relating to the scope of the subpoena and of the authority of the signer of the subpoena are for the judiciary in enforcement proceedings. But that is the limit of the permissible inquiry of the court. It is submitted that the reasons, both legal and practical, for not tampering with the rule of that case are persuasive. The alternative would threaten break-down of administrative enforcement altogether (Attorney General's Comments on S. 2030—78th Cong., 1st Sess.).

In its comments on the bill, the Board said:

The provision that the courts, upon contest of the validity of a subpoena or similar process or demand shall determine all questions of law raised by the parties including the agency's authority or jurisdiction, makes a substantial and, in the Board's view, a highly undesirable change in the law. The law is now well settled that questions as to the Board's authority and jurisdiction are not open to review by the District Courts in proceedings to enforce a subpoena or otherwise; these questions are left to determination by the appropriate appellate court upon enforcement or review proceedings of the Board's final decision and order. This procedure has the advantage of avoiding piece-meal litigation and duplicitous review of jurisdictional issues. It also has a sound practical

basis, for frequently issuance of a subpoena is necessary to develop the facts as to whether or not jurisdiction exists in the Board. Accordingly it is necessary in practice for the subpoena to be enforced *before* the Board's jurisdiction is or can be established. (Citing language from *N. L. R. B. v. Barrett*, 120 F. 2d 583, 585-589.) See also *N. L. R. B. v. Northern Trust Co.*, 56 F. Supp. 335 (D. C. Ill.) affirmed Feb. 28, 1945, 16 L. R. R. 559 (C. A. 7); *Endicott-Johnson v. Perkins*, 317 U. S. 501. We submit that the reasons for the preservation of the present rule are persuasive and that the adoption of the proposed change might seriously impair administrative enforcement.

Section 6 (c) (5 U. S. C. 1005 (c)) as finally enacted in the Administrative Procedure Act was thereupon changed to read as follows:

Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Commenting on this language, the Attorney General in an Additional Statement which was made a part of the Congressional Record by Representative Hobbs while the bill was being debated in the House, said the following:

Under Section 6 (c) it is provided that "upon contest the court shall sustain any such

subpoena or similar process or demand to the extent that it is in accordance with law." This provision is not intended to change the law as expounded in *Endicott Johnson v. Perkins* (317 U. S. 501, 1943), in which the Supreme Court held that a subpoena issued by an agency will be accorded due respect by the Court if they are within the agency's power and that there would be no independent inquiry as to whether the particular person subpoenaed comes within the coverage of the Act enforced by the agency. The law as expounded in *Endicott Johnson v. Perkins* is still applicable. All that this section requires is that the court determine whether the subpoena issued comes within the general power of that agency. There need be no *in limine* inquiries as to whether the person subpoenaed is or not covered by the act (Attorney General's Additional Statement, 92 Cong. Rec. A. 2988).<sup>7a</sup>

There is no contention here that the Board lacked jurisdiction or authority to initiate, entertain and decide cases of the same general type and class as the proceeding in which the subpoena was issued. Indeed that proceeding is an ordinary unfair labor practice case in which appellant's employer is charged with having engaged in an unfair labor practice by discharging employees because of union activities. Nor is it contended that the subpoena was not issued in accordance with the requirements of the statute or

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<sup>7a</sup> The foregoing observation on Section 6 (c) is again set forth with additional supporting material in the Attorney General's Manual on the Administrative Procedure Act (pp. 68-69), the relevant portions of which are reproduced in Appendix B *infra*, p. 30, *et seq.*

that the scope of the subpoena is so broad as to be oppressive. And it is expressly conceded that evidence demanded is relevant. In these circumstances, the issues as to whether the proceeding before the Board was barred by the period of limitation prescribed by the proviso to Section 10 (b) of the Act, and whether the Union and its officers had complied with the requirements of Section 9 (f) (g) and (h) can no more be litigated in subpoena enforcement proceedings than the substantive issue whether appellant's employer had in fact discharged employees because of union activities, or the jurisdictional issue whether the unfair labor practice in which appellant's employer is alleged to have engaged affected commerce as defined in the Act.

Sections 10 (e) and (f) make elaborate provisions whereby an employer may obtain judicial review of any action taken by the Board. These provisions have been held to satisfy the requirements of due process of law and to be exclusive. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 47; *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U. S. 54. In view of this fact, it is established that an employer could not enjoin the proceedings in which the subpoena was issued. *Myers v. Bethlehem Shipbuilding Corp.*, *supra*; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, *supra*. Yet if the contentions which appellant urges on this appeal were sustained she could achieve by indirection what she would not be permitted to accomplish directly. As the Court of Appeals for the Seventh Circuit said

in *N. L. R. B. v. Northern Trust Co.*, 148 F. 2d 24, 27 (certiorari denied, 326 U. S. 731):

The *Myers* and *Newport News* cases, *supra*, make it plain that the initial determination of jurisdiction by the Board may not be enjoined, and obviously this prohibition would become meaningless if judicial examination of the same question were permitted in a subpoena enforcement action.<sup>9</sup>

This is not to say that the remedies made available to employers by Sections 10 (e) and (f) of the Act could be resorted to by appellant. She is not a party to the proceeding before the Board and cannot be affected by any order that the Board may ultimately enter. As we have shown, *supra* p. 4-9, appellant is a mere witness and therefore has no standing to challenge the jurisdiction of the Board. This is only to say that even if the defenses which would be available to her employer, were also available to her, they would still be irrelevant in this proceeding. If her employer could not, under the doctrine expounded in the *Myers* and *Newport News* cases, assert the defenses on

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<sup>9</sup> See also *Perkins v. Endicott-Johnson Corporation*, 128 F. 2d 203, 219 (C. A. 2d), affirmed 317 U. S. 501, where the court said:

"The doctrine of the *Bethlehem, Schaufler and Edison* (*Federal Power Comm. v. Metropolitan Edison Co.*, 304 U. S. 375) cases would become frivolous and lack real substance; it would relate merely to one procedural device utilized by a respondent wishing to have the courts interfere with what the Supreme Court said in those cases was the 'exclusive initial power' of the administrative officials to investigate and determine their own jurisdiction. If defendants were to win here, they would have discovered a way of 'running around the end' when blocked at the center. We do not take so lightly those recent and as yet undisturbed Supreme Court decisions."

which appellant relies, it follows *a fortiori* that appellant cannot do so.

The only authority on which appellant relies to sustain her contention that she is free to challenge the jurisdiction of the Board in a subpoena enforcement proceeding is an isolated statement in the Supreme Court's opinion in *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41, 49 which reads as follows:

The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made.

But this statement does not support appellant's contention. As the Supreme Court pointed out in *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186, 212 a challenge to the administrative agency's jurisdiction is not "an appropriate defence."

The same contentions which appellant urges for denying enforcement of the subpoena were rejected by the District Court for the Southern District of Georgia in *N. L. R. B. v. Central of Georgia Railway Company, F. P. Love and D. G. Bland Lumber Company* (decided January 24, 1949, Civil No. 430, not reported). The Court in accordance with the practice of that Circuit, included in its order directing enforcement of the subpoena its reasons for overruling the employer's contentions. In pertinent part the Court's order reads as follows:

The answer of the D. G. Bland Lumber Company pleads several defenses challenging the jurisdiction of Petitioner to conduct the

investigation in aid of which the subpoena was issued, asserting, among other things that the Petitioner is without power to conduct the investigation or to issue the subpoena because the labor organization which invoked its jurisdiction and the officers thereof had failed to comply with the requirements of Section 9 (f), (g), and (h) of the Act. The Court is of the opinion, however, that the question of the jurisdiction of the Petitioner to conduct the investigation is not before the Court and cannot be litigated in a proceeding to enforce a subpoena but only in a proceeding brought pursuant to Section 10 of the Act in an appropriate Court of Appeals. *Endicott-Johnson Corporation v. Perkins*, 317 U. S. 501; *Oklahoma Press Publishing Co. v. Walling*, 327 U. S. 186; *Cudahy Packing Co. v. National Labor Relations Board*, 117 F. 2d 692 (C. A. 10); *Myers v. Bethlehem Shipbuilding Corporation*, 303 U. S. 41; *McCauley v. Waterman Steamship Corp.*, 327 U. S. 540.

For like reasons appellant's contentions should be rejected here.

### III

#### **Questions as to sufficiency of the pleadings and correctness of the Trial Examiner's rulings on the reception of evidence are not reviewable in subpoena enforcement proceedings**

Appellant devotes a considerable portion of her brief to an effort to show that the complaint and charge in the administrative proceeding are insufficient to show that the requirements of Section 10 (b), 9 (f), (g), and (h) have been met. She argues at length that this claimed insufficiency of the formal

papers in the administrative proceeding, coupled with the refusal of the General Counsel of the Board to offer evidence showing compliance with the sections mentioned and the refusal of the Trial Examiner to receive evidence tending to show that they had not been complied with, demonstrated that the Board was without authority to proceed. These are matters which simply relate to the sufficiency of the pleadings, the adequacy of proof, and the correctness of rulings on the reception of evidence. We have shown (Point I, p. 4, *supra*) that appellant is merely a witness and that as such she is without standing to challenge the jurisdiction of the Board. For equal or greater reasons she is without standing to resist compliance with the subpoena for the reasons which pertain only to the merits and not to the jurisdiction of the Board.

All objections relating to the pleadings, proof, and conduct of the administrative proceeding may properly be urged by a party to that proceeding before the Board and in the event of an adverse decision by the Board in appropriate proceedings instituted in a Court of Appeals under Section 10 (e) or (f). But they are wholly irrelevant in a proceeding to enforce a subpoena. Even a party to the administrative proceeding could not defeat enforcement of a subpoena on such grounds. *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501, 509 n. 11.

**CONCLUSION**

It is respectfully submitted that the judgment of the Court below is right and that it should be affirmed.

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JUNE 1949.

## APPENDIX A

National Labor Relations Act (49 Stat. 449, 29 U. S. C. Supp. I 151) as amended by the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C. 141 et seq.)

### Section 9:

“(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

“(1) the name of such labor organization and the address of its principal place of business;

“(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

“(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

“(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

“(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

“(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

“(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

“(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

“(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any

employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

“(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate of constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

#### Section 10:

“(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any in-

dustry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

“(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to in-

tervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

Section 11:

"For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer

oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence, if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

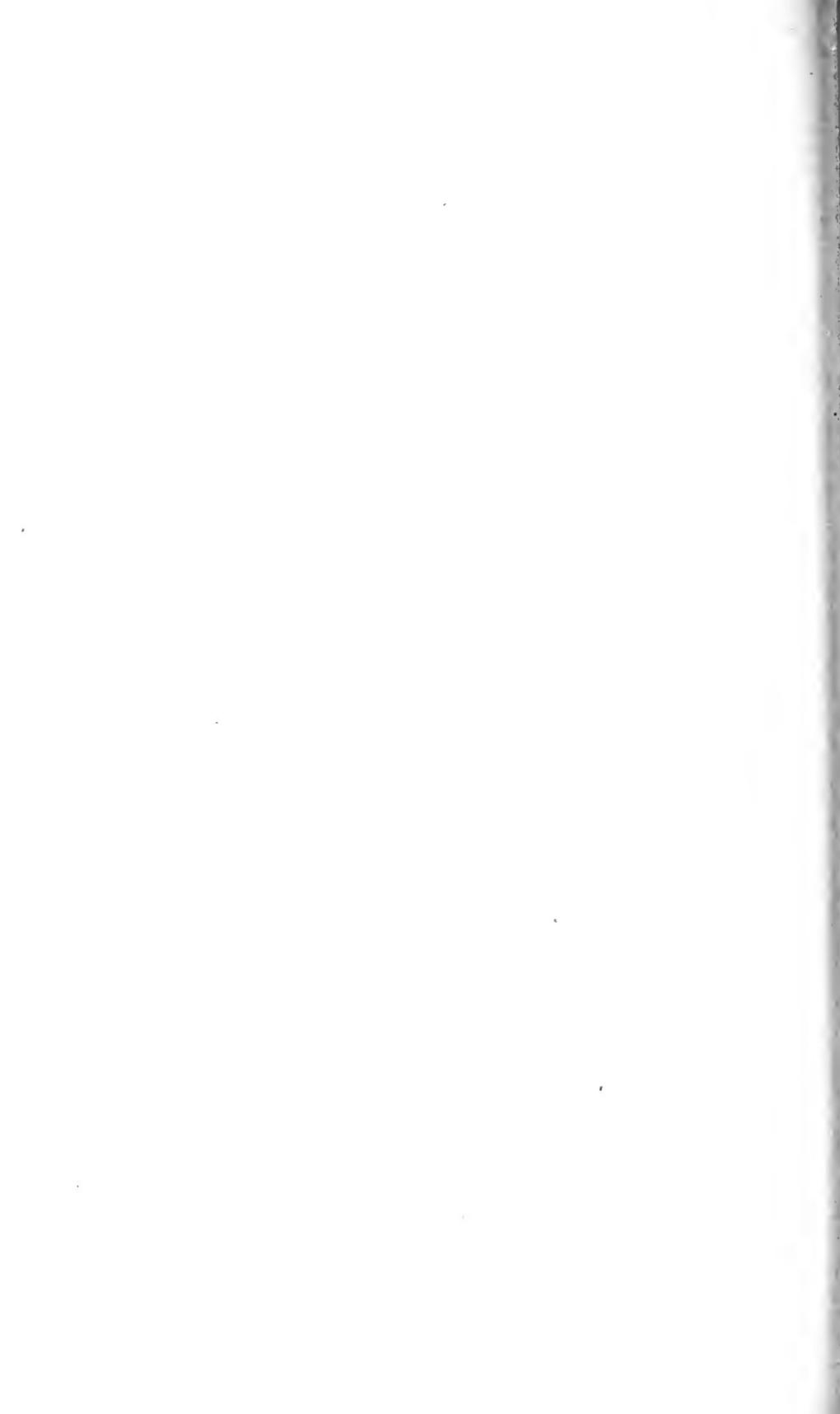
## APPENDIX B

Comment on subpoena enforcing requirements of Section 6 (c) of the Administrative Procedure Act appearing in Attorney General's Manual of The Administrative Procedure Act (Federal Prison Industries, Inc., Press (1947)), at pp. 68-69:

The second sentence of section 6 (c) provides that "Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply." Upon its face, the subsection in requiring judicial enforcement of subpoenas "found to be in accordance with law" is a reference to and an adoption of the existing law with respect to subpoenas. For example, nothing in section 6 (c) seems intended to change existing law as to the reasonableness and scope of subpoenas. Similarly, the subsection leaves unchanged existing law as to the scope of judicial inquiry where enforcement of a subpoena is sought. In *Endicott Johnson Corp. v. Perkins*, 317 U. S. 501 (1943), the Supreme Court held that where the Secretary of Labor sought judicial enforcement of a subpoena issued in a proceeding under the Walsh-Healey Public Contracts Act, the District Court was not authorized to determine whether the respondent was subject to that act, as a condition precedent to enforcement of the subpoena. Accord, under the Fair Labor Standards Act, *Oklahoma Press Publishing Company v. Walling*, 327 U. S. 186 (1946). Nothing in the

language of section 6 (c) suggests any purpose to change this established rule. It is said only that the court shall enforce a subpoena "to the extent that it is found to be in accordance with law." "Law" refers to the statutes which a particular agency administers, together with relevant judicial decisions.

This natural and literal construction of the second sentence of section 6 (c) finds conclusive support in the legislative history of the provision. When S. 7 was introduced by Senator McCarran on January 6, 1945, section 6 (c) provided that "Upon any contest of the validity of a subpoena or similar process or demand, the court shall determine all relevant questions of law raised by the parties, *including the authority or jurisdiction of the agency.*" [Italics supplied.] Clearly this language could be construed as intended to change the rule stated in *Endicott Johnson Corp. v. Perkins, supra*. However, when S. 7 was reported by the Senate Committee on the Judiciary on November 19, 1945 (Sen. Rep. p. 34 (Sen. Doc. p. 220)), section 6 was rephrased in its present form. This significant change in language, as well as the natural and literal reading of section 6 (c), is persuasive that the subsection leaves unchanged the scope of judicial inquiry upon an application for the enforcement of a subpoena. See also Sen. Rep. p. 41 (Sen. Doc. p. 227); 92 Cong. Rec. A2988 (Sen. Doc. p. 415).



No. 12,197

IN THE  
United States  
Court of Appeals  
For the Ninth Circuit

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LOUISE HAMILTON,

vs.

*Appellant,*

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

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Reply Brief on Behalf of  
Appellant Louise Hamilton

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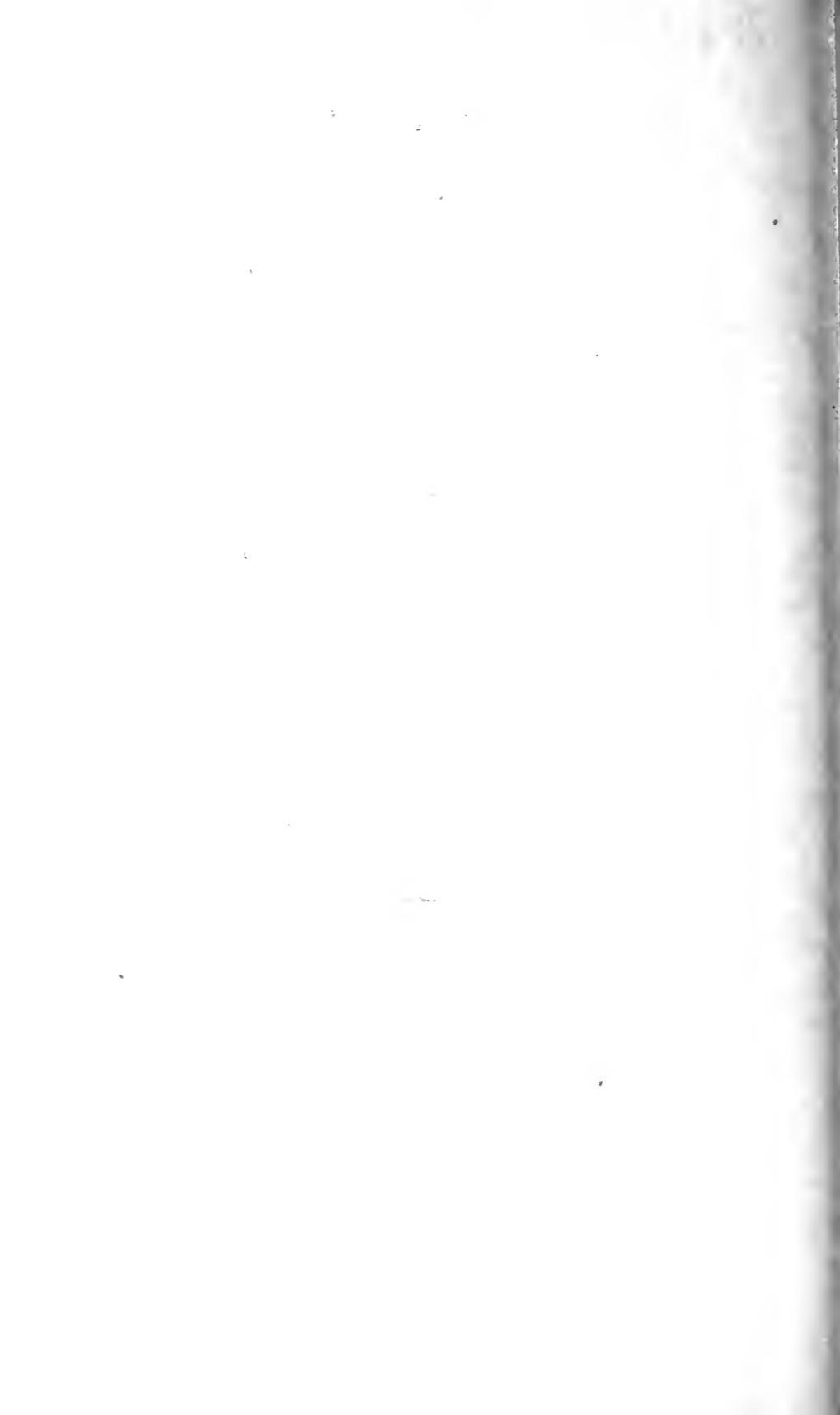
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No. 12,197

IN THE  
**United States  
Court of Appeals  
For the Ninth Circuit**

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LOUISE HAMILTON,

vs.

NATIONAL LABOR RELATIONS BOARD,

*Appellant,*

*Appellee.*

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**Reply Brief on Behalf of  
Appellant Louise Hamilton**

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This is in reply to respondent's brief filed June 27, 1949. We shall first correct certain of respondent's basic misstatements with respect to appellant's position and her admissions.

Appellant's basic position is that the Labor Board shows, on the face of its formal papers and as a matter purely of law, that there is no possible basis upon which it can find it has jurisdiction or authority to proceed in the case to which the subpoena was ancillary. Respondent asserts that appellant, in so defending against enforcement of the subpoena, seeks to litigate

"issues of law and fact which the Board has the power to decide and in fact must decide in the course of the administrative proceeding" (Resp. Br. 11). This is wholly erroneous. No issue of fact is before the court.

Respondent also asserts that appellant admits that the subpoena was issued in accordance with the statute. Appellant denies that it was so issued because the statute gives authority to issue a subpoena in a formal hearing only where a complaint has lawfully issued so that a proceeding is lawfully commenced.

Respondent also asserts that appellant admits that the evidence to be produced was relevant and material. Appellant asserts that it is not relevant and material to "any matter under investigation or in question before the Board, its member, agent, or agency conducting the hearing or investigation", but relevant only to a matter not before the Board.

### I.

#### **A CLEAR AND AFFIRMATIVE SHOWING OF NO POSSIBLE JURISDICTION OR AUTHORITY TO PROCEED IS AN APPROPRIATE DEFENSE TO THE ENFORCEMENT OF A SUBPOENA OF AN ADMINISTRATIVE AGENCY AND ONE THAT MAY BE OFFERED BY A WITNESS NOT A PARTY TO THE ADMINISTRATIVE PROCEEDING.**

Appellant urges the court to refuse to enforce the subpoena on the ground that there is a clear and affirmative showing of no possible jurisdiction or authority in the Board to proceed.

Respondent does not meet this argument. Instead it argues that the court should not usurp the Board's function of considering the evidence as to its jurisdiction, making the inferences, and in the first instance finding the facts upon which its jurisdiction and authority must stand or fall. This argument, however, does not answer or contravene appellant's position; appellant has not asked the court to do any of these things.

Respondent's first point, that the witness has no standing to litigate the merits of the dispute or the facts as to jurisdiction as a defense against enforcement of the subpoena, similarly is groundless because appellant's defense is of a different nature.

## A Person Who Is Not a Party to the Board's Proceeding May Defend Against the Enforcement of a Subpoena.

The Board has come into court to seek enforcement of its subpoena. Its application is based solely on the jurisdiction granted the District Court by Section 11 of the National Labor Relations Act.<sup>1</sup> This section provides that when a person refuses to comply with a subpoena of the Board the District Court "upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, and to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question." This provision does not require the District Court to enforce the subpoena. It gives the court jurisdiction to act on the Board's application. The court is not made a rubber stamp of every subpoena that the Board issues. "The statute does not require the District Court to issue the order, but simply gives it jurisdiction to issue. The enforcement of the subpoena is thus confided to the discretion of the District Court which is to be judicially exercised." *Goodyear Tire & Rubber Company v. Labor Board*, 122 F.2d 450, 453.

It is well established that in exercising its jurisdiction, the court must refuse enforcement where an "appropriate defense" is offered. *Meyers v. Bethlehem Shipbuilding Corporation*, 303 U.S. 41; *Federal Power Commission v. Metropolitan Edison Co.*, 304 U.S. 375; *Federal Trade Commission v. Claire Furnace Co.*, 274 U.S. 160; *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217.

A witness may resist the enforcement of a subpoena on numerous grounds. A witness may defend on the ground that the agency issuing the subpoena has acted arbitrarily or in excess of statutory authority. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216. He may submit that his privilege, such as that against self-incrimination, has been violated. See

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1. The relevant portions of Sections 10 and 11 of the National Labor Relations Act are printed in Appendix A.

*Boyd v. United States*, 116 U.S. 616. He may defend on the ground that the subpoena is unduly vague or unduly burdensome. *Hale v. Henkel*, 201 U.S. 43. He may defend on the ground that subpoena was not issued by the person solely vested with that power by the statute. *Cudahy Packing Co. v. Holland*, 316 U.S. 357. He may defend on the ground that the subpoena related only to a "fishing expedition" and not to the trial of issues within the Board's jurisdiction. *Federal Trade Commission v. American Tobacco Co.*, 264 U.S. 298; *Ellis v. Interstate Commerce Commission*, 237 U.S. 434. He may defend on the ground that the evidence sought is not germane to any lawful subject of inquiry in the administrative proceeding. *Harriman v. Interstate Commerce Commission*, 211 U.S. 407. He may defend on the ground that the hearing is not of the kind authorized by statute. *Ellis v. Interstate Commerce Commission*, 237 U.S. 434. He may defend on the ground that the hearing in aid of which the evidence is submitted was terminated. *Jones v. Securities and Exchange Commission*, 248 U.S. 1. He may defend on the ground that the formal papers of the administrative agency and the record before the court show that there is no possible basis for jurisdiction or authority in the proceeding to which the subpoena is ancillary. *Perkins v. Endicott-Johnson Corp.*, 128 F.2d 208, 215, 224. He is not required to submit to the demand that he testify "if in any respect it is unreasonable or overreaching the authority Congress has given." *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 217.

The District Court is obliged, under the National Labor Relations Act and the cases, to consider a witness's defense and, if it be "appropriate", deny enforcement of the subpoena. And there is a further statutory duty on the court to consider a defense like that of appellant.

The Administrative Procedure Act provides a basic statutory provision with respect to the defenses to be considered by the court. Thus, Section 6(c) provides that the subpoena should be enforced "to the extent that it is found to be in accordance with

law." The paragraph of the Senate Report on this Act that deals with this provision in Section 6(c) reads as follows:

"The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should instead, inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction."

Appellant merely asks the court to do what is required by the Administrative Procedure Act, Section 6(c) (printed in Appendix A). It asks the court to inquire generally into the legal and factual situation and submits this will show that the Board could not possibly find that it has jurisdiction.<sup>2</sup>

**A Clear and Affirmative Showing of No Possible Jurisdiction or Authority to Proceed Is an Appropriate Defense of a Non-Party Witness.**

Respondent argues, with numerous citations (Resp. Br. 5-9), that a witness cannot require a court that has been requested to enforce an administrative tribunal to consider evidence and decide the facts on which a claim of Board jurisdiction is based. This argument is not directed at appellant's position. None of its cases raised the type of a defense that a witness is entitled to make under the Administrative Procedure Act.

Most of the cases cited by respondent hold that there was jurisdiction to take and consider the evidence. In two cases, the court held the tribunal issuing the subpoena had jurisdiction over the issues to which it pertained. *Howat v. Kansas*, 258 U.S.

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2. Respondent refers at length to comments of the Attorney General with respect to this Act when it was before Congress. Such comments, even if appropriate for consideration as to legislative intent, clearly cannot be used to contravene the language of the statute or the intent of Congress stated in the report accompanying the bill. In any event even his comments make no suggestion that a non-party witness cannot raise a defense such as that of appellant in this case.

181, 185;<sup>3</sup> *Fairfield v. United States*, 146 Fed. 508, 509. In two cases the court specifically stated the tribunal had jurisdiction at least to determine whether it had jurisdiction to act. *Blair v. United States*, 250 U.S. 273, 283; *Perkins v. Endicott-Johnson Corp.*, 128 F.2d 208, 213, 214. Two cases are grand jury cases decided on the authority of the *Blair* case upholding the general jurisdiction of the grand jury to investigate possible crimes. *United States v. McGovern*, 60 F.2d 880, *United States v. Watson*, 262 Fed. 776. None of the other cases cited raises a question as to jurisdiction. The relevance and materiality of the evidence sought was the sole issue in *Nelson v. United States*, 201 U.S. 92, 115, and *Beran v. Krieger*, 289 U.S. 450, 463-464, and it was the ground for refusing to testify in *Fairfield v. United States*, 146 Fed. 508, 509. In *United States v. Government of Germany*, 5 Fed. Supp. 97, it was asserted that the testimony was not material and the court found it was material. In *Bronson v. United States*, 32 F.2d 844, no question was raised as to the authority or jurisdiction of the Commissioner of Internal Revenue to carry on the proceeding in aid of which the subpoena was issued.

The opinion in *Blair v. United States*, 250 U.S. 273, clearly shows it is not determinative of this appeal. This case had to do with the general inquisitorial powers of the grand jury, not with the trial of a specific unfair labor practice raised by a specific complaint in a specific proceeding of a tribunal of limited jurisdiction.<sup>4</sup>

3. Respondent refers to a dicta that indicates there may be an alternative ground for the court's decision. The opinion indicates that there are two definite grounds that the court relies upon for its decision. The relevant portions of the opinion are quoted in Appendix B.

4. The appropriate meaning to be given to *Blair v. United States* is apparent from the following quotation from *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216, discussing the limitations on the right of an administrative agency in exercising its investigative functions of searching out violations with a view of securing enforcement of the statute:

"These are that he shall not act arbitrarily or in excess of his statutory authority, but this does not mean that his inquiry must be 'limited \* \* \* by forecasts of the probable result of the investigation \* \* \*' *Blair v. United States*, 250 U.S. 273, 282."

The Court relied on the nature of the grand jury. It discussed the history of the grand jury, its general inquisitorial function as developed through centuries of Anglo American jurisprudence, its judicial nature, and concluded: "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, of the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." (250 U.S. 273, 282). The Court furthermore specifically held that the grand jury did have authority and jurisdiction to take the evidence involved in this case; it stated, "The court and grand jury have authority and jurisdiction to investigate the facts in order to determine the question whether the facts show a case within their jurisdiction." (250 U.S. 273, 283).

The weakness of respondent's argument is even more obvious in its reliance on the *Endicott-Johnson* case,<sup>5</sup> which apparently is chiefly relied upon by respondent for it is referred to on pages 7, 9, 12, 13, 14, 15, 16, 17, 19, 21 and 22 of its brief. The Court of Appeals opinion clearly states the distinction between the cases relied upon by respondent and the position taken by appellant on this appeal. While that case holds that the courts should not make an independent investigation of the facts on the basis of which jurisdiction is claimed by an administrative agency that has issued a subpoena, it clearly upholds and sustains the right of a witness to defend on the ground presented here and declares that appellant's defense to the issuance of the subpoena involved herein is full and complete.

The Supreme Court, in holding that the subpoena should be enforced, pointed to the fact that the District Court had over-

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5. *Perkins v. Endicott-Johnson Corp.*, 128 F.2d 208, affirm'd sub nom *Endicott-Johnson Corp. v. Perkins*, 317 U.S. 501.

ruled the contention of the Secretary of Labor that it was for her to decide the factual issue as to coverage and had itself tried this question. The Court held that the determination of that issue was primarily the duty of the Secretary and not of the District Court. "The Secretary may take the same view of the evidence that the District Court did, or she may not. The consequence of the action of the District Court was to disable the Secretary from rendering a complete decision on the alleged violation as Congress had directed her to do, and that decision was stated by the act to be conclusive as to matters of fact for purposes of the award of government contracts. Congress sought to have the procurement officers advised by the experience and discretion of the Secretary rather than of the District Court. To perform her function she must draw inferences and make findings from the same conflicting materials that the District Court considered in anticipating and foreclosing her conclusions." (317 U.S. 501, 509).

Appellant here has not asked the District Court to make the mistake the lower court made in the *Endicott-Johnson* case. Appellant here has directed the court solely to the formal papers of the Board and to the narrow questions of law there presented. The court was not asked to take evidence or otherwise to take over the Board's function of making initial findings of fact. Nor was the court asked to disregard the Congressional mandate that the Board's findings of fact are to be accepted if supported by evidence. The Board's allegations of fact are accepted in this proceeding as if they were findings supported by evidence; clearly there is no invasion of the Board's primary jurisdiction or substitution of the court's judgment for that of the Board. The issues being solely of law, they are issues that in any event are to be decided by the courts and not by the Board.

It is also most significant that the Circuit Court of Appeals supported its decision in the *Endicott-Johnson* case by stating that a subpoena could not be enforced where a defense like that of

appellant herein was presented. Thus it stated (at 121 F.2d 208, 215):

"When \* \* \* a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena."

Again it stated (p. 224):

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena. And the same result would follow if an administrative order for hearing under the Walsh-Healey Act, or the plaintiff's pleadings in the subpoena suit, explicitly stated (1) that the defendant was not a contractor with the government, or (2) that the contract did not contain the required statutory stipulations, or (3) that the contract was of a kind explicitly excluded by §9, from the operations of the Act. Admittedly there is no such *affirmative defect here.*" (Emphasis added.)

Respondent also refers to *Labor Board v. Northern Trust Company*, 148 F.2d 24, 27. The sharp contrast between the issue in that case and the issue in the present appeal clearly shows the case is not in point and that respondent has not even attempted to meet the issue presented by appellant. In that case a witness opposed enforcement of a subpoena in aid of a proceeding regarding an alleged unfair labor practice of a bank. The witness contended that no unfair labor practice of a bank could possibly affect interstate commerce and so the subpoena should

not be enforced. The court did not enforce the subpoena on the ground, *relied on by respondent herein*, that the witness had no right to raise such a defense. Instead the court held that the defense was not made out because the bank's unfair labor practice could affect commerce and so the Board had jurisdiction to consider the issues raised. By considering this defense, the court recognized that there was a right to make it.

In the *Northern Trust* case, the court enforced the subpoena because there were factual issues that might be decided so as to give jurisdiction to the Board.

The present case is different. It presents no factual issue to the court. As in the *Endicott-Johnson* examples of situations where a subpoena would not be enforced, the Board's admissions and the facts on the face of the Board's formal papers show the "affirmative defect" that there could be no possible basis upon which the Board can find facts giving it authority and jurisdiction. There is, therefore, no basis for enforcing the subpoena.

## II.

### **THE 1947 AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT GO TO THE JURISDICTION OF THE BOARD.**

Appellant asserts that the 1947 amendments to the National Labor Relations Act cut down the jurisdiction of the Board.

"When Congress passes an act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted.

\* \* \* The powers of departments, boards and administrative agencies are subject to expansion, contraction, or abolition at the will of the legislative and executive branches of the government." (*Stark v. Wickard*, 321 U.S. 288, 310.)  
(Emphasis added.)

Appellant relies on statutory provisions that are integral parts of the sections that grant the Board jurisdiction where certain express conditions are met. The sole basis for the Board's juris-

diction is provided in Sections 9 and 10 of the Act.<sup>6</sup> They provide that a complaint may issue, and that issuance of a complaint gives authority or jurisdiction to hold formal hearings like that involved herein, only if the following conditions are met:

1. The unfair labor practices described in the complaint affect commerce.
2. A charge of the unfair labor practice has been filed with the Board.
3. Where the charge is filed by a union, it has complied with the non-Communist affidavit provisions of Section 9(h).
4. Where the charge has been filed by a union, it has complied with the information requirements of Section 9(f) and (g).
5. A charge stating the unfair labor practice has been served upon the person allegedly guilty within six months after it occurred.

The foregoing conditions to the exercise of jurisdiction to proceed to a hearing are imposed in substantially the same type of language. If there is any material difference in the language, that used in the 1947 amendments establishing the conditions numbered 3, 4 and 5 is more clearly jurisdictional.

The general grant of jurisdiction is in the following provisions of Section 10:

"(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. \* \* \*

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent

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6. The relevant excerpts from these sections are printed in Appendix A.

or agency, as a place therein fixed, not less than five days after the serving of said complaint: PROVIDED, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, \* \* \*

This means that the Board has jurisdiction only if the unfair labor practice affects commerce. "Thus the yardstick for determining whether the Board has jurisdiction \* \* \* is the existence of interstate commerce." *Labor Board v. Northern Trust Co.*, 148 F.2d 24, 27.

Furthermore, this is the language that also makes the filing of a charge go to the Board's jurisdiction. "It is well settled that \* \* \* a charge is necessary to set the machinery of an inquiry in motion \* \* \* and that once a charge is filed the Board's jurisdiction attaches." (Resp. Br., p. 11, note 8). Respondent's admission is well supported by authority holding the filing of the charge goes to the Board's jurisdiction. *Labor Board v. Hopwood Retinning Co.*, 98 F.2d 97, 101; *Labor Board v. National Licorice Co.*, 104 F.2d 655, 658; App. Br. 28, 29.

It being well established, and substantially admitted by respondent, that the references to interstate commerce and to the filing of a charge go to the jurisdiction and authority of the Board, the contention that the 1947 amendments relied upon by appellant do not equally go to the jurisdiction or authority of the Board is too esoteric for legal comprehension. Thus, the above quotation, which gives jurisdiction or authority to commence proceedings only upon issuance of a complaint, concludes with the exception reading as follows: "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." If there is no power at law to issue a complaint because no charge has been filed or because it does not refer to "such an unfair labor practice" (to-wit, one "affecting commerce") or otherwise, the Board can have no jurisdiction or authority over the issues.

The language of Section 9 goes equally to the jurisdiction and authority of the Board; it provides, "*No complaint shall be issued* pursuant to a charge made by a labor organization under subsection (b) of Section 10 unless" the requirements of subsection (f) are met. And again, "*No complaint shall issue* under Section 10 with respect to a charge filed by a labor organization unless" the requirements of subsection (g) are met. And again, "*No complaint shall be issued* pursuant to a charge made by a labor organization under subsection (b) of Section 10, unless" the requirements of subsection (h) are met.<sup>7</sup>

None of the cases cited by respondent militate against the proposition, obvious upon the face of the statute, that the five requirements stated above go to the jurisdiction and authority of the Board. Respondent's citations are not in point; none involves the National Labor Relations Act. The cases cited by appellant, and in fact respondent's own admission with respect to the charge, clearly confirm the obvious fact that the requirements do go to the jurisdiction and authority of the Board.

It is further apparent, from the language of the Circuit Court of Appeals in the *Endicott-Johnson* case quoted above at page 9, that a witness will not be required to testify in a proceeding as to which the Board admits that any condition like all five of these has not been satisfied.

### III.

#### **THE FACE OF THE FORMAL PAPERS OF THE BOARD AND THE ADMISSIONS OF THE BOARD IN THE DISTRICT COURT CLEARLY AND AFFIRMATIVELY SHOW THAT THERE IS NO POSSIBLE JURISDICTION OR AUTHORITY TO PROCEED IN THE CASE TO WHICH THE SUBPOENA WAS ANCILLARY.**

The Board asserts, in a long footnote (Resp. Br. 11), that there may be a dispute as to some of the affirmative jurisdictional defects pointed out by appellant. These several "affirmative defects" will be taken up in the order followed in appellant's principal brief.

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7. The relevant portions of Section 9 are printed in Appendix A.

**1. No Charge Was Served Within Six Months of the Occurrence of the Alleged Unfair Labor Practices.**

The Board can not find, and does not contend, that a charge was served before February, 1948. However, the Court might gain the impression that there may have been an earlier service in view of respondent's statement beginning: "Again, even if there had been no service of the charge before the effective date of the 1947 amendments to the Act" (Resp. Br. 11). The implication is totally without foundation, either in fact or even in the contentions of the Board. Thus the Board's formal papers show that the only basis for the proceeding lies in the charges dated January 26, 1948 (R. 31-36); furthermore, there is nothing in the record before the Court or in the formal papers that even suggests that the Board relies upon any other charge.

Respondent also suggests it might have jurisdiction to commence a proceeding by the issuance of a complaint after the effective date of the 1947 amendments although no charge was served within six months of the alleged unfair labor practice. This suggestion is totally without foundation. The statutory language reads:

"No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof."

Respondent urges that this language does not apply if there was service within six months of the effective date of the statute. The Labor-Management Relations Act gives no basis for this proposition, for it specifically provides that the withdrawal of power to issue a complaint was to be effective two months after the enactment of the statute.. *Labor-Management Relations Act—1947*, Sec. 104.

Respondent seeks to avoid this clear statutory provision. It asserts that an artificial and contrary effect is possible if the

Labor-Management Relations Act is construed like a statute of limitations passed by a state legislature and if, in addition, it is construed according to a rule of constructing such statutes that would not in any event be applicable in a situation like that here presented.

Respondent's argument not only flies in the face of the statutory language but is wholly without basis for several reasons.

First. Congress, in distinction to state and territorial legislatures, has plenary power to take away a statutory right it has given by depriving the courts or administrative tribunals of jurisdiction to consider claims based on such rights or by other method Congress deems appropriate. *Stark v. Wickard*, 221 U.S. 228, 309; App. Br. 25-27; *Seese v. Bethlehem Steel Co.*, 158 F.2d 58;<sup>8</sup> *Attallah v. B. H. Hubbert & Son*, 168 F.2d 993, cert. den. 335 U.S. 868; *Battaglia v. General Motors Corp.*, 169 F.2d 254, 258-259; *Fisch v. General Motors Corp.*, 169 F.2d 266, cert. den. 335 U.S. 902.

Second. This Act may not be interpreted as if it were a statute of limitations cutting down the time for suing on a private right. An unfair labor practice proceeding is inherently different from an ordinary action in court. The difference is fatal to respondent's argument. A proceeding on an unfair labor practice before the National Labor Relations Board is not a litigation of private rights. The Board carries on proceedings to protect the public's interest against labor disputes affecting commerce. It does so in the fashion directed by Congress. Its orders are for the protection of the public; any effect on private rights is purely incidental. Thus no individual has a right to compel the Board to take action on a charge filed or to stop the Board's action once a charge has been filed, or to take an order directing that he be given back pay into the Court of Appeals for enforcement, nor has he standing to compel the Board to seek such

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8. It is to be noted that in the *Seese* case the court referred to the "more than one hundred decisions of the Federal District Courts and state courts" upholding such action of Congress in the *Portal-to-Portal Act*.

enforcement (App. Br. pp. 24-27). Even a state legislature, giving consideration to the "public benefit which would result if enforcement officers spent their time on fresh claims rather than stale ones" and the "valid public purpose in limiting the expenditures of time and money in the effort to enforce stale claims" (31 C.2d 210, 216, 217), may immediately cut off an existing remedy of a state agency.

"The power of the Legislature to lessen a statute of limitations is subject to the restriction that an existing right cannot be cut off summarily without giving a reasonable time after the act becomes effective to exercise such right. (See *Davis & McMillan v. Industrial Acc. Com.*, 198 Cal. 631, 637 [246 P. 1046, 46 A.L.R. 1095].) This principle, however, does not apply where the state gives up a right previously possessed by it or by one of its agencies. Except where such an agency is given powers by the Constitution, it derives its authority from the Legislature, which may add to or take away from those powers, and therefore, a statute which adversely affects *only* the right of the state is not invalid merely because it operates to cut off an existing remedy of an agency of the state."

*California Employment Stabilization Commission v. Payne*, 31 C.2d 210, 215, 187 Pac.2d 702, 705.

Since the National Labor Relations Act gives an individual no right of action but only a privilege of calling a violation to the attention of the agency and since the agency alone has any right to commence, continue, discontinue and conclude proceedings before the Board or proceedings to enforce a Board order, a Congressional dictate to the agency as to what cases shall be processed does not have the effect of cutting off any private rights, for none can develop until a court orders back pay.

Third. Even if this were an ordinary lawsuit between private individuals, the rule suggested by respondent would have no application. Respondent relies on *Carscadden v. Alaska*, 105 F.2d 377. In that case the court applied the rule referred to by respondent with respect to a cause of action for which the period

of limitations was reduced from ten to seven years. The court pointed out that if the statute were not construed in the fashion referred to by respondent here, a literal interpretation of the statute reducing the period of limitations "would have the effect of absolutely barring" an action that accrued more than the limited time prior to enactment. In the present case, such an effect was precluded by the statute itself so an interpretation to give this effect would be redundant. Thus the Labor-Management Relations Act allowed a period of two months for the issuance of complaints based upon stale unfair labor practices. Such a time having been allowed, there was a reasonable time granted for taking care of existing claims. A statute, even of a state legislature, may "bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." *Meigs v. Roberts*, 162 N.Y. 371; *Turner v. New York*, 168 U.S. 90; *Saranac Land & Lumber Co. v. Roberts*, 177 U.S. 318; *Davault v. Essig*, 80 C.A.2d 970, 973. On this ground that the reason for the *Carscadden* interpretation is wholly absent—in addition to the grounds based on public character of the rights involved and on their purely statutory source and on Congress's unlimited power to take them away—there clearly is no basis for applying the strained interpretation of the *Carscadden* case.

## **2. No Charge, Within the Meaning of the Law, Was Ever Filed.**

Respondent does not suggest any answer to appellant's position that the "charge" relied upon in the formal papers before the Board is not a charge within the meaning of the Act. There is nothing in the record before this Court or in the Board's formal papers to contravene the fact that the Board solely relies upon the purported charges incorporated in its formal papers and in the record before this Court.

Respondent's contention that the Board once had jurisdiction to issue a complaint based on the filing of a charge before passage of the amendments ignores the power of Congress to take away any jurisdiction to commence a proceeding that has been granted.

**3. The Board Has Failed and Refused to Raise Any Issue of Fact with Respect to Whether the Charging Union Has Complied with Subsections (f), (g) and (h) of Section 9 and so Cannot Possibly Find Such Compliance.**

Respondent in its brief indicates that there might be an issue of fact with respect to the lack of compliance asserted by appellant (App. Br. pp. 32-41). Nothing in the Board's formal papers or in the record in this Court gives any basis for the Board's contention in this Court that there has been compliance. Appellant submits that, in view of this state of the formal papers and the Board's refusal to consider evidence on these issues, this ground is a full defense to enforcement of the subpoena, in any event until the Board amends its pleadings to show that the Board claims compliance by the charging union somewhere in its formal papers or in the record in the District Court.

Appellant also asserted (App. Br. 34), and this is not answered, that non-compliance is obvious upon the face of the formal papers because the charging union claims affiliation with the Congress of Industrial Organization and its refusal to comply is a matter of which this Court may take judicial notice.

**4. The Formal Papers Include No Allegations of the Facts Necessary to Establish the Board's Jurisdiction Under the Act as Amended in 1947.**

Appellant pointed out several obvious jurisdictional deficiencies in the formal papers of the Board and clearly demonstrated that a tribunal of limited jurisdiction can have no jurisdiction over a proceeding unless the facts supporting its jurisdiction are alleged in the papers upon which the proceeding is based (App. Br. pp. 41, 42). Appellant's only answer—that the witness is not entitled to call the attention of the court to the obvious lack of jurisdiction apparent on the face of these papers—has been shown to be wholly without merit (*supra*, pp. 2-10).

## 5. The Board Has No Jurisdiction Because a Complaint Has Never Lawfully Issued.

For the reasons stated above, it is obvious that there never was jurisdiction or authority to issue a complaint and that the purported issuance of a complaint was wholly outside the statutory authority of the agency. Respondent offers no argument that the Board has jurisdiction where there was no power to issue a complaint.

### IV.

## THE BOARD IS NOT ENTITLED TO ENFORCEMENT OF THIS SUBPOENA MERELY BECAUSE IT MIGHT HAVE JURISDICTION IN SOME OTHER PROCEEDING ON SOME OTHER UNFAIR LABOR PRACTICE COMPLAINED OF IN SOME OTHER CHARGE AND COMPLAINT.

Respondent's position resolves itself into a claim that the subpoena should be enforced merely because the Board might have jurisdiction in some other case and that the court should ignore the clear and affirmative showing that the Board has no possible jurisdiction in this case. Thus, respondent asserts (Resp. Br. 17):

"There is no contention here that the Board lacked jurisdiction or authority to initiate, entertain and decide cases of the same general type and class as the proceeding in which the subpoena was issued. Indeed, that proceeding is an ordinary unfair labor practice case in which appellant's employer is charged with having engaged in an unfair labor practice by discharging employees because of union activities."

This argument proves too much. It would require the court to enforce a subpoena merely because an unfair labor practice was charged. As we have shown above, the statutes and cases provide that there shall be no such "rubber-stamp" enforcement. Enforcement must be refused where it affirmatively appears that the alleged unfair labor practice does not affect commerce or that a charge has not been filed or where other "affirmative defect" appears.

Before a subpoena will be enforced, there must be some possibility that the Board can show jurisdiction or authority to proceed. We submit that *a person may rightfully demand*, when called upon to testify in a formal proceeding based upon specific formal papers and with respect to a definite unfair labor practice, *that the Board show there is such a possibility of jurisdiction with respect to the particular proceeding in aid of which enforcement of the subpoena is sought*. The basis for enforcement must be found in the realities of this case, not in some fictitious unfair labor practice complained of in some fictitious formal papers and in litigation in some fictitious proceeding, all existing solely in the imagination of the Board. With such a fictitious case and such a fictitious basis for a subpoena, this Court is not concerned.

### **CONCLUSION**

Appellant has conclusively demonstrated on several independent grounds that the Board's formal papers show it is completely impossible for the Board to find that it has any jurisdiction in the proceeding involved. This "affirmative defect" in the Board's proceeding requires this Court, we respectfully submit, to reverse the decision of the District Court and order that the Application for Enforcement of the Subpoena be dismissed and that the Order to Show Cause be quashed.

Dated: San Francisco, July 7, 1949.

Respectfully submitted,

ANTHONY J. KENNEDY,  
CARL KUCHMAN,  
GILFORD G. ROWLAND,  
RICHARD ERNST,  
*Attorneys for Appellant.*

(APPENDICES FOLLOW)

## **APPENDIX A**

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### **Excerpts From Labor-Management Relations Act**

SEC. 9(f). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and by-laws and a report, in such form as the Secretary may prescribe, showing—

- (1) the name of such labor organization and the address of its principal place of business;
- (2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;
- (3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;
- (4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;
- (5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;
- (6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure fol-

lowed with respect to (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f)(A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f)(B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9(e)(1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9(e)(1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by an illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

SEC. 10(a). The Board is empowered as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is consistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes,

shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, secs. 723-B, 723-C).

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person

being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In the case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

**Section 6(c) of the Administrative Procedure Act provides:**

"Agency subpoenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement of showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpoena or similar process or demand to the extent that it is found to be in accordance with law, and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply."

**APPENDIX B****Howat v. Kansas, 258 U.S. 181, 184-186.**

reads as follows:

"In No. 154, Howat and the other plaintiffs in error were subpoenaed to appear before the so-called Court of Industrial Relations to testify in an investigation into conditions existing in the mining industry in Cherokee and Crawford Counties. They failed to appear. The powers of the tribunal in such a case are set forth in §11 of the act, reading in part as follows:

"'Said Court \* \* \* shall have the power and authority to issue summons and subpoenas and compel the attendance of witnesses and parties \* \* \* and to make any and all investigations necessary to ascertain the truth in regard to said controversy. In case any person shall fail or refuse to obey any summons or subpoena issued by said court after due service then and in that event said court is hereby authorized and empowered to take proper proceedings in any court of competent jurisdiction to compel obedience to such summons or subpoena.'

"Under this section, the board made application to the District Court of Crawford County, the court of first instance of general jurisdiction in that county, to issue an order directing the plaintiffs in error to attend the board and testify. This order was issued, duly served and disobeyed. The contemnors were then brought into court by attachment. Their plea that the legislation under which they were subpoenaed was void was held to be insufficient and they were committed to jail until they should comply with the subpoena. The contemnors appealed to the Supreme Court of the State, which affirmed the action of the District Court holding that, without regard to the validity of the particular provisions of the Industrial Relations Act of which they complained, they were under legal obligation to obey the subpoena and were in contempt for not doing so. The court invited attention to §28 of the act, which provides that, "If any section or provision of this act shall be found invalid by any

court, it shall be conclusively presumed that this act would have been passed by the legislature without such invalid section or provision, and the act as a whole shall not be declared invalid by reason of the fact that one or more sections or provisions may be found to be invalid by any court;" and pointed out that, even if the compulsory features of the act, to the constitutionality of which the plaintiffs in error objected, were invalid, there still remained in the act provision for investigation and findings by the Industrial Relations Court, in respect to which the power of the Legislature was indisputable and in furtherance of which the machinery for compelling the attendance and testimony of witnesses was appropriate. The court relied on the decision of this court in respect to a similar provision in the Interstate Commerce Law in which the Interstate Commerce Commission was authorized to secure attendance of witnesses at any investigation by it, through a proceeding before a Circuit Court of the United States. *Interstate Commerce Commission v. Brimson*, 154 U.S. 447, 448, 449. It would seem to be sustained also by the decision of this court in *Blair v. United States*, 250 U.S. 273, wherein it was held that a witness summoned to give testimony before a grand jury in the District Court of the United States was not entitled to refuse to testify, when ordered by the court to do so, upon the plea that the court and jury were without jurisdiction over the supposed offense under investigation because the statute denouncing the offense was unconstitutional.

"But even if we did not agree with the state court on this point, what we have said shows that the case was decided and disposed of by that court without any consideration of the application of the Federal Constitution to the features of the Kansas statute of which complaint is made. Even if those features are void, these contempt proceedings the state court sustains on general law. We can not, therefore, consider the federal questions mooted and assigned for error. *Southern Pacific Co. v. Schuyler*, 227 U.S. 601, 610; *Leathe v. Thomas*, 207 U.S. 93, 98; *Giles v. Teasley*, 193 U.S. 146, 160; *Hopkins v. McLure*, 133 U.S. 380, 386; *Hale v. Akers*, 132 U.S. 554, 564."

**No. 12,197**

IN THE  
**United States  
Court of Appeals  
For the Ninth Circuit**

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LOUISE HAMILTON,

*Appellant,*

vs.

NATIONAL LABOR RELATIONS BOARD,

*Appellee.*

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**Surrebuttal Brief on Behalf of  
Appellant, Louise Hamilton**

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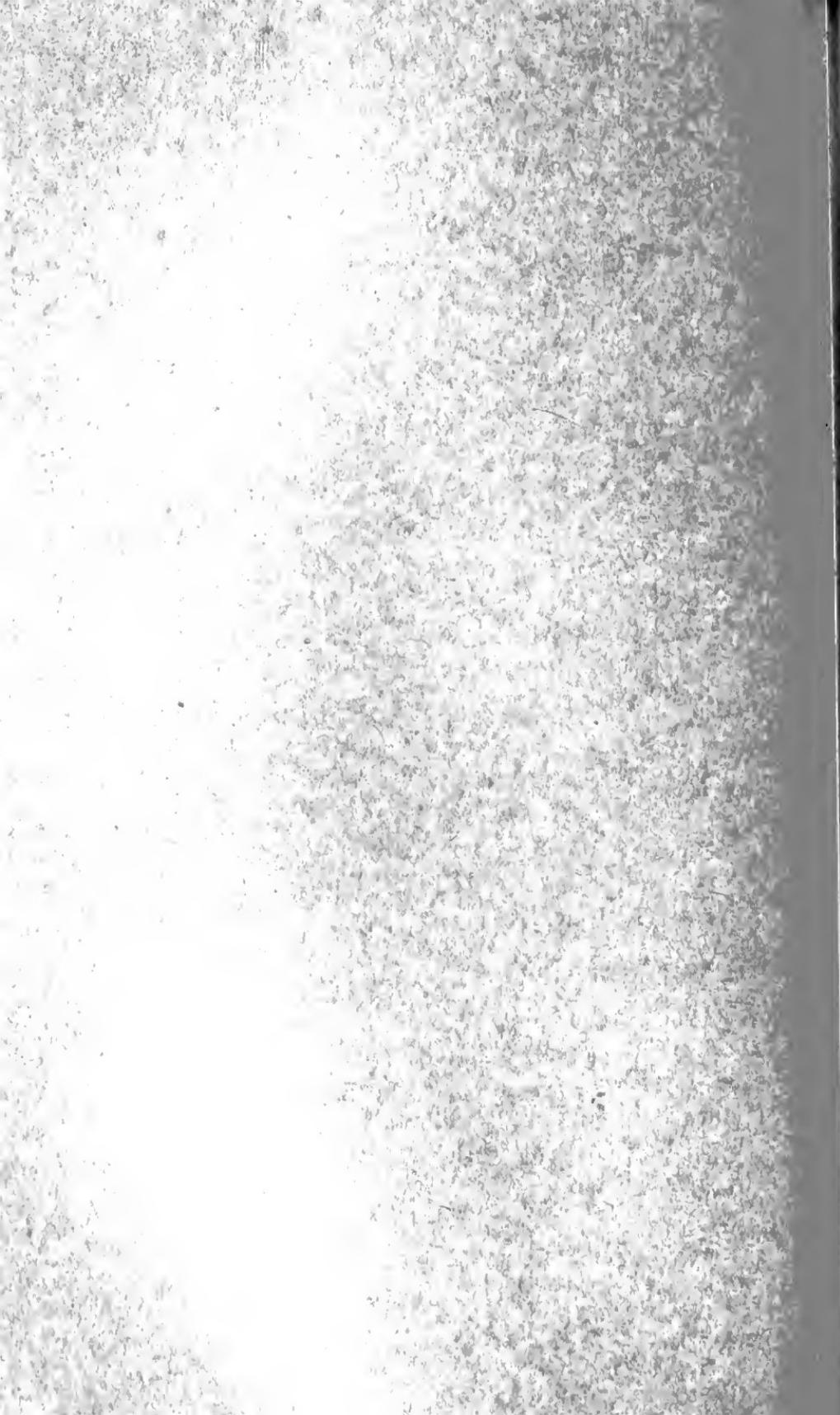
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IN THE  
**United States  
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LOUISE HAMILTON,

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vs.

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**Surrebuttal Brief on Behalf of  
Appellant, Louise Hamilton**

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This is in reply to respondent's Rebuttal Brief filed shortly before the oral argument and is submitted by leave of the Court granted at the oral argument on October 7, 1949.

In appellant's previous briefs she has argued (1) a witness not a party to the administrative proceeding will not be required to comply with a subpoena of an administrative tribunal where she interposes an "appropriate defense" such as a clear and affirmative showing of no pos-

sible jurisdiction or authority to proceed in the administrative hearing to which the subpoena is ancillary; (2) that the 1947 amendments to the National Labor Relations Act deprive the Board and the general counsel of any authority to issue a complaint (the issuance of which is necessary to commence a proceeding before the Board) where the charging union has not complied with the non-Communist affidavit provisions [Section 9(h)] or where a charge has not been filed or where a charge has not been served within six months [Section 10(b)]; and (3) it is affirmatively clear upon the face of the formal papers of the Board that it can have no possible jurisdiction or authority to proceed in the case in aid of which the subpoena involved in this appeal was issued.

Respondent's Rebuttal Brief contends that the amendments adding Section 9(h), with respect to non-Communist affidavits, and to Section 10(b), withdrawing and denying jurisdiction to issue a complaint where a charge has not been served within six months, are not to be considered by the courts in subpoena enforcement proceedings. Respondent asserts, in substance, that the Board may carry on a proceeding in direct and flagrant violation of these restrictions on its statutory jurisdiction and get affirmative equitable relief from the courts, in the form of sanctions to enforce its subpoena issued in such a proceeding. Respondent argues not merely that the courts must ignore its clear and undeniable abuse of its power, but that they must assist its abuse by compelling witnesses to give up their civil rights of privacy.

Appellant answers that her civil right, which Mr. Justice Brandeis has characterized as the most comprehensive of

rights and the right most valued by civilized men,<sup>1</sup> is protected by both statute and Constitution against such an arbitrary and unreasonable infringement. She, necessarily, must present her defense to this infringement of her civil right at this time. Once she has been compelled, by the sanctions available to the courts, to appear before the Board and testify, her right of privacy has been completely and irremediably destroyed.

**The Individual's Right of Privacy, Embracing the Right to Not Testify, Is Protected by the Constitution and the Statutes**

Appellant has a right that she relies upon in this proceeding as her defense against the Board's demand that the courts order her to testify. It is based on the Fourth Amendment to the Constitution, the Administrative Procedure Act, and numerous cases fixing limitations upon the interference that will be brooked in the form of administrative subpoenas. The field of her "appropriate defenses" to the administrative subpoena is broader, she submits, than is the field of defenses to judicial subpoenas; it is broader by virtue of the specific statutory provisions as well as by virtue of the differences between courts, steeped in the protection of the individual, and administrative tribunals, inherently steeped in the enforcement of the public interest, a field in which they have justly acquired a reputation for expertness and ability.

Congress, recognizing that administrative tribunals should be intent on their specialized protection of the public, has denied them the right to enforce their own subpoenas; instead it has granted the courts *jurisdiction*

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1. *Olmstead v. United States*, 277 U.S. 438, 478-479.

to enforce administrative subpoenas. By the Administrative Procedure Act, it has required the courts, when requested to enforce an administrative subpoena, to "inquire generally into the legal and factual situation and be satisfied that the agency could possibly find that it has jurisdiction" before ordering enforcement.<sup>2</sup> On the basis of these statutory limitations, appellant claims that she should not be compelled to testify in this proceeding because her defenses are "appropriate" to an administrative subpoena though they might not be sufficient were the subpoena issued by a court in aid of a proceeding being carried on before it.

In this respect, she calls the attention of the court to the provisions of the 1947 amendment to Section 11(1) of the Act. This makes the issuance of a subpoena by the Board mandatory upon the filing of an application for it. Thus in this case there has been no exercise of discretion by the Board that a subpoena should issue; discretion as to issuance and enforcement is solely a matter for the court in this proceeding. The statute provides for no consideration for the rights of an individual called upon to testify until enforcement proceedings begin.

The Supreme Court on several occasions has clearly pointed out that there must be a compromise between the public interest, which requires *some* intrusion on private security, and the civil right of privacy, which must be safeguarded against arbitrary abuse of governmental power. These interests must be balanced. The courts of justice in supervising the propriety of administrative use

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2. Senate Report on Section 6(c) of the Administrative Procedure Act.

of the subpoena power maintain that balance.<sup>3</sup> In a recent Supreme Court case on this issue, the Court stated: "The basic compromise has been worked out in a manner to secure the public interest and at the same time to guard the private ones affected against the only abuses from which protection rightfully may be claimed. The latter are . . . the interests of men to be free from officious intermeddling, whether because irrelevant to any lawful purpose or because unauthorized by law, concerning matters which on proper occasion and within lawfully conferred authority of broad limits are subject to public examination in the public interest. Officious examination . . . can become persecution when carried beyond reason."<sup>4</sup>

Appellant claims that the reasons advanced by the Labor Board in its Rebuttal Brief demonstrate that she rightfully claims protection against this subpoena, which is simply "officious intermeddling," because not authorized by law in this proceeding.

**The Right to Not Testify Is Entitled to Protection Against a Claim of Administrative Jurisdiction That Is in Direct and Flagrant Contravention of Law.**

The Board argues that the question of whether a charge was filed and was served within six months is a matter

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3. See dissent of Mr. Justice Cardozo in *Jones v. Securities and Exchange Commission*, 298 U.S. 1, 32, 33, in which he clearly distinguishes star chamber procedure from modern administrative procedure in carrying on inquiries, where "the propriety of every question in the course of the inquiry \* \* \* (is) subject to the supervision of the ordinary courts of justice."

4. *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 213.

that must be "initially" determined only by it and involves questions of fact as well as a question of law. This argument, which would be material in opposition to an injunction against the Board's proceeding with a hearing outside its jurisdiction, is wholly irrelevant in this proceeding.

The court is required, we have seen, to consider generally the legal and factual situation at this time. The court commits error if it enforces a subpoena without being satisfied that the tribunal can possibly find it has jurisdiction. Here the facts, the ultimate facts or the conclusions of fact as well as the evidentiary facts, are undisputed. The alleged unfair labor practice occurred about August 1, 1946; the alleged charge was served in February, 1948.

There is nothing esoteric about the number of months intervening between these dates that requires the "expertness" of an administrative tribunal to count them. The cases cited by the Board relating to "evidentiary facts"—*Gray v. Powell*, 314 U.S. 402, 412, and *United States v. Louisville & Nashville R. R.*, 235 U.S. 314, 320—merely hold that the courts should not substitute their judgment for that of the administrative tribunal as to whether the evidentiary facts show, respectively, that a railroad was a "producer" of coal or that the granting of a reshipping privilege was an "undue and unreasonable preference." They do not hold that a court, in the proper case here before it, cannot count the months from August, 1946, to February, 1948.

Neither is the respondent's citation of *Newport News Co. v. Schaufler*, 303 U.S. 54, 57, in point. There the company sought to litigate whether it was engaged in inter-

state commerce, and to litigate the facts, in court and prior to the initial action on the issues by the Board. The case involved neither the question of what is an appropriate defense an application for enforcement of a subpoena nor a question limited to issues of law appearing on the face of the Board's own allegations.

The Board further contends, "The jurisdiction of the Board having attached prior to the enactment of the Labor-Management Relations Act continued after, and was unimpaired by, the amendments effected by that Act" (Rebuttal Brief, p. 8). This bold conclusion completely ignores the power of Congress to take away jurisdiction and its specific language that "no complaint shall issue."

We submit that our previous briefs have clearly established that the service of a charge within 6 months is jurisdictional to the issuance of a complaint and that the Board's own papers clearly and affirmatively show that this jurisdictional requirement cannot be satisfied in this proceeding. It thus being impossible for the Board to find it has jurisdiction in this proceeding, the court must refuse enforcement of the subpoena. *Perkins v. Endicott-Johnson Corp.*, 128 F.(2d) 208, 215, 224.<sup>5</sup>

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5. See, in addition to the Senate Report (note 2 above), the language of Judge Frank in *Perkins v. Endicott-Johnson Corp.*, 128 F.(2d) 208, 215, 224: "When \* \* \* a fundamental factor—a lack of all possible statutory authority to compel the witnesses to answer—is apparent on the very face of the record before the court, it should, of course, refuse to enforce the administrative subpoena." (This lack is apparent on the face of the record here.)

"As we have seen, an administrative proceeding might, on the face of the record, be so clearly without legal foundation that a court would be obliged to refuse to enforce a subpoena issued in aid of that proceeding. Thus, if, in a National Labor Relations Board case, the Board's order or its pleadings in a suit to enforce

**The Right to Not Testify Is Entitled to Protection Against a Claim  
of Administrative Jurisdiction That Is Being Conclusively Pre-  
sumed by a Board That Affirmatively and Openly Refuses to  
Exercise Any Jurisdiction to Determine Jurisdiction.**

With respect to the non-Communist affidavit issue, the Board conclusively presumes it has jurisdiction. Thus in its Rebuttal Brief, the Board states that it "does not permit the parties in a case before it to litigate the compliance status of any participating union" (p. 9). It thus refuses to consider whether or not it has jurisdiction. It is refusing to exercise any jurisdiction it has to determine its jurisdiction initially.

The Board asserts in its Rebuttal Brief, p. 11, "Whether a complaint should issue in any given case rests in the administrative discretion of the General Counsel (formerly the Board). This discretion is not reviewable." This is correct where the General Counsel *refuses* to issue a complaint that he has jurisdiction to issue. It is obviously incorrect when he seeks to act outside his jurisdiction. When he acts without jurisdiction he acts merely as a private citizen, not as a public officer. A complaint so "issued" is no complaint at all, and it must be treated as a nullity whenever questioned thereafter in a proper proceeding. We have shown that this is the proper time for a witness

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its subpoena, affirmatively stated or admitted that the respondent employer was engaged in a business having no possible connection with interstate commerce, no court could properly order compliance with the subpoena." An exactly analogous situation is presented to the court in this case. To enforce the subpoena, we submit, is to overrule the *Endicott-Johnson* and *Oklahoma Press Publishing* rationale as to the court's duty and power in exercising its discretion on an application to enforce an administrative subpoena.

to raise such a question, that it is a proper question for her to raise, and that the "complaint" is a nullity.

Respondent replies that the issuance of a complaint by the General Counsel is an act of discretion similar to the President's calling out of the militia; thus it cites *Martin v. Mott*, 12 Wheat. 19, and similar cases, for the proposition that a court—and so too the Board<sup>6</sup>—cannot consider whether he acted within his jurisdiction in issuing the complaint. There is no analogy between the President's calling out the militia to oppose the British invasion of the War of 1812 and the issuance of a complaint against a union or employer who allegedly committed an unfair labor practice.

The question of whether the affidavits are on file is clearly a question that is susceptible of adjudication at a formal hearing. If the issue is joined by the pleadings before the Board, the General Counsel can readily present evidence as to the papers in the files. If the issue is not joined, evidence is not necessary. It would not frequently be required, but the issue must be open to litigation for it goes to the Board's jurisdiction.

The fundamental difference between the parties is clear from respondent's final citation, *Perkins v. Lukens Steel Co.* It is admitted that the appellant is not entitled to go to court to attempt to compel the Board to comply with every element of the law in issuing all complaints. If she were here seeking a mandatory injunction to require the General Counsel to determine there was compliance in

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6. The Board, however, itself has reviewed and reversed the General Counsel's interpretation of the non-Communist affidavit provision (*Matter of Northern Virginia Broadcasters Inc.*, 75 N.L.R.B. 11).

every case, and not merely in the Typical case referred to on page 13 of the Board's Rebuttal Brief, she would be seeking to vindicate the public interest, a matter that generally should be left to the political process (cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125, referred to at p. 15, Rebuttal Brief).

Appellant, however, relies on her right to *not testify* except as required by the Administrative Procedure Act and the leading cases such as *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186; *Perkins v. Endicott-Johnson Corp.*, 128 F.(2d) 208, and *Jones v. Securities and Exchange Commission*, 298 U.S. 1. She claims that the law does not require her to testify in an administrative proceeding that, in the eyes of the law, has not begun. She asserts that the Board cannot find it has jurisdiction in view of the non-Communist affidavit requirement, because it refuses to hear the matter and, refusing to hear, it cannot decide or find. Similarly she asserts that the Board cannot find it has jurisdiction in view of the requirement that a charge be filed and be served within six months because the Board admits the absence of service until some eighteen months after the acts.

### **CONCLUSION**

Appellant believes it is manifest that she is entitled to call the attention of the court to the complete impossibility of the Board's finding it has jurisdiction in the proceeding in which the Board would have her testify, that the Administrative Procedure Act and the recent Supreme Court cases require this court to balance her private right to not testify against the public interest being ad-

vanced by the Board, and that in this case there is an arbitrary and unreasonable attempt by government officials, acting without any color of authority in the Board's proceeding, to ask this court to compel her to testify although they admit the facts showing they have no jurisdiction on one score and although on another they flatly refuse to consider whether they have jurisdiction by conclusively presuming that their action is within their jurisdiction. To seek testimony in such a proceeding, is the type of "officious intermeddling" to which the courts will not require submission. Reasonable consideration to private rights in the balance before this court shows, we respectfully submit, no overbalancing public interest that will justify an invasion of appellant's civil rights.

Respectfully submitted,

ANTHONY J. KENNEDY,

CARL KUCHMAN,

GILFORD G. ROWLAND,

RICHARD ERNST,

*Attorneys for Appellant.*



No. 12198

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United States  
Court of Appeals  
for the Ninth Circuit

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STATE OF CALIFORNIA, Department of Employment,  
Appellant,

vs.

FRED S. RENAUD & CO., Debtor, and GEORGE GARDNER, Receiver of the Estate of FRED S. RENAUD & CO., Debtor,  
Appellees.

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Transcript of Record

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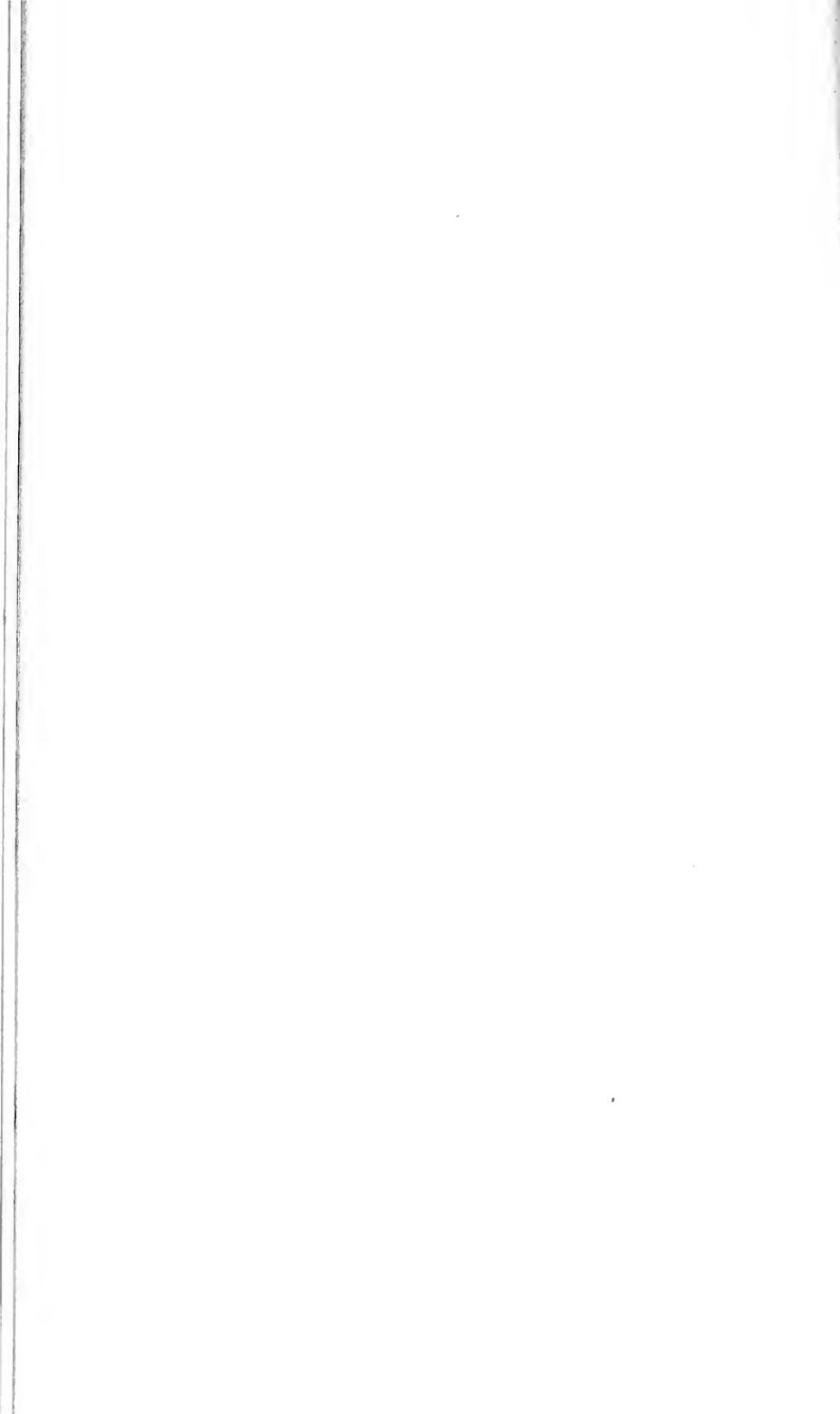
Appeal from the United States District Court  
for the Southern District of California  
Central Division

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PAUL P. O'BRIEN

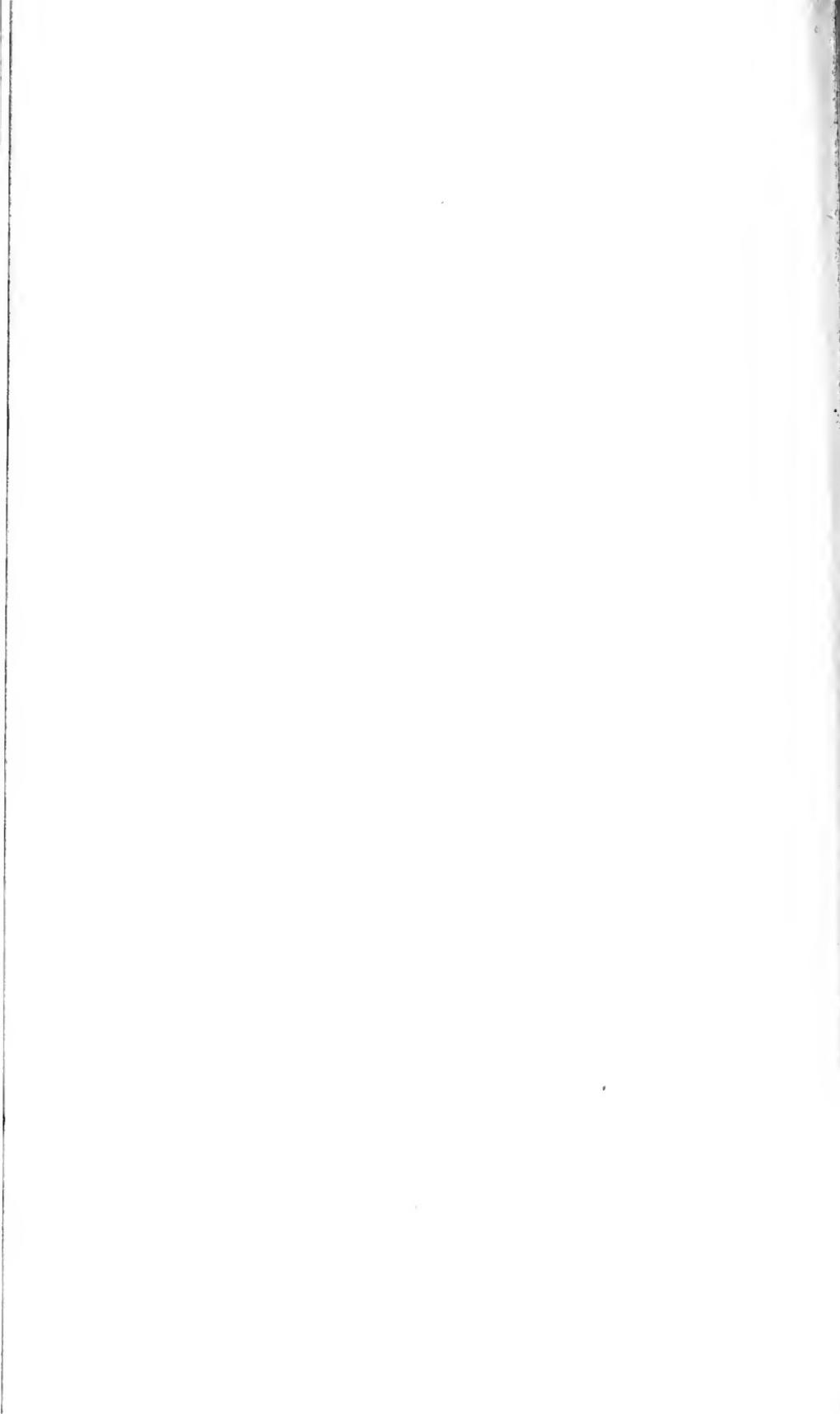
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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GEORGE GARDNER,  
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Los Angeles 13, Calif.

In the District Court of the United States, Southern  
District of California, Central Division

No. 45452-PH

In the Matter of  
FRED S. RENAUD & CO., a Corporation,

Debtor.

**AGREED STATEMENT ON APPEAL  
PURSUANT TO RULE 76 F.R.C.P.**

Pursuant to Rule 76, Federal Rules of Civil Procedure providing for an agreed statement of the case, the debtor herein, Fred S. Renauld & Co., Inc., and its counsel, Rupert B. Turnbull, Esq., and the tax claimant-creditor, State of California, Department of Employment, and its counsel, Fred N. Howser, Attorney General of the State of California, and Vincent P. Lafferty, Deputy Attorney General, do hereby mutually agree to the following statement of the case showing how the question involved arose, how it was decided in the United States District Court, and setting forth the facts necessary to decision by the Appellate Court.

**The Proceedings**

This is a proceeding under Chapter XI of the Bankruptcy Act. An order confirming the debtor's plan of arrangement has been duly entered. The State of California through its Department of Employment filed its claim in the amount of \$1,503.98 interest, for taxes arising under the Unemployment Insurance Act. Objections to the claim were jointly

filed by the debtor and receiver and, after hearing, the Referee allowed the claim except for the amount of \$454.99.

The amount disallowed represents the tax claimed as due from the debtor based upon wages paid by it to certain employees after its incorporation on July 1, 1946. These employees had (prior to incorporation) been employees of a partnership consisting of Fred S. and Naomi Renauld, and the partnership had, during the year 1946, paid tax on the first \$3,000.00 in wages paid to each employee.

Upon incorporation, the debtor considered that no further tax need be paid upon wages to employees who had during the partnership operations (and during the calendar year) received \$3,000.00. The tax claimant, State of California, assessed the tax upon the theory and contention that upon incorporation the debtor became a new employer and was required to pay tax measured by the first \$3,000.00 paid to any of its employees regardless of tax paid on any amount paid by the predecessor partnership to the same employees.

The Referee ruled that in the calendar year 1946, the partnership and the corporation were one "employer" under the California Unemployment Insurance Act and that the corporation was not required to start anew the \$3,000.00 limitation upon incorporation on July 1, 1946. This ruling was predicated upon the following:

#### Necessary Facts Involved

1. On July 1, 1946, the debtor corporation took over a business which was at the time operated

by a partnership composed of Fred S. Renauld and his wife.

2. That the consideration for the transfer of the *stock* from the partnership to the corporation was the issuance of all of the stock of the corporation to the said Fred S. Renauld, his wife having directed that her share of such stock be issued to him under an express agreement between them that the stock would be their community property;

3. That there was no change in the type of the business or the place of business after it was transferred to the corporation and that the actual management of the business was conducted by the corporation through and by its sole stockholder Fred S. Renauld in the same manner as it had been conducted during the partnership operations;

4. That the same employees, in general, performed services for the corporation as performed services for the partnership; that the taxes both before and after July 1, 1946, all relate to the calendar year of 1946;

5. That the reserve account of the partnership with the California Department of Employment was transferred to the corporation and that the rate of contribution or merit rating of the partnership with the said Department was assigned to the corporation;

6. That in the calendar year 1946 the employment of the persons who had worked for the partnership and who continued to work for the corporation was considered as one employment by the corporation;

7. That the corporation had taken the position

that when any one of its employees had been paid the sum of \$3,000.00 as an employee of the business here involved in the calendar year 1946, either before or after the corporation took over the said business from the said partnership on the first day of July of such year, that then and in that event, the corporation was not liable for contributions under the California Unemployment Insurance Act on any further amounts paid to such employee in excess of such sum of \$3,000.00 in said calendar year;

8. That the California Department of Employment took the position that the corporation was liable for contributions under the California Unemployment Insurance Act on the whole of the first \$3,000.00 paid by it to any one of its employees in the calendar year of 1946 and subsequent to the first day of July of such year, notwithstanding the fact that such employee had been paid the whole or part of such sum of \$3,000.00 as an employee of the business here involved in such calendar year and before the corporation took over the said business from the said partnership on the first day of July of such year;

9. That the California Department of Employment, in its claim here involved, had included the sum of \$454.99, which it asserted was owing by the corporation because of the fact that it had not paid contributions under the California Unemployment Insurance Act on the whole of the first \$3,000.00 which it had paid to each of its employees after they became employees of the corporation on July 1, 1946.

The State of California petitioned for review of the Referee's order, briefs were submitted and considered and arguments heard in the United States District Court which adopted the Findings of Fact of the Referee as its own and issued the following Order:

In the District Court of the United States, Southern District of California, Central Division

No. 45452-PH

In the Matter of

FRED S. RENAUD & CO., a Corporation,

Debtor.

**ORDER**

The Petition of the tax claimant, State of California, Department of Employment, for Review of the Order of Benno M. Brink, Referee in Bankruptcy, dated September 8, 1948, denying in part the claim of the petitioner for taxes having come on for hearing before the District Court of the United States, Southern District, Central Division, Honorable Peirson M. Hall, Judge presiding, on December 6, 1948, the debtor, Fred S. Renauld & Co., Inc., being represented by Rupert B. Turnbull, Esq., counsel for the debtor, and the petitioner being represented by Fred N. Howser, Attorney General of the State of California by Vincent P. Lafferty, Deputy Attorney General, and the Points and Authorities of both the petitioner and debtor having been submitted and considered and arguments having been heard and the court be-

ing fully advised in the premises, and written Findings of Fact and Conclusions of Law having been made herein, it is hereby

Ordered, Adjudged and Decreed, that the claim of the Department of Employment of the State of California be allowed only in the sum of \$1,048.99, and no more, and that the portion of its claim in the sum of \$454.99 be and the same is disallowed and denied, and that the total claim of the Department of Employment of the State of California be and hereby is allowed in the sum of \$1,048.99 as a prior tax claim and to be paid as such.

PEIRSON M. HALL,  
Judge, United States District  
Court.

Dated: January 14, 1949.

From this Order of the United States District Court the State of California filed the following Notice of Appeal:

No. 45452-PH

In the Matter of  
**FRED S. RENAULD & CO., a Corporation,**  
Debtor.

**NOTICE OF APPEAL TO THE CIRCUIT  
COURT OF APPEALS**

Notice is hereby given that the State of California, Department of Employment, tax claimant in the within proceedings, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from

the Order of the United States District Court, Southern District of California, Central Division, and of Honorable Peirson M. Hall, Judge thereof, denying and disallowing in part the claim of the said Department, entered in this action on January 17, 1949.

FRED N. HOWSER,  
Attorney General.

CHARLES W. JOHNSON,  
Deputy Attorney General.

WILLIAM L. SHAW,  
Deputy Attorney General.

VINCENT P. LAFFERTY,  
Deputy Attorney General.

By /s/ VINCENT P. LAFFERTY,  
Attorneys for Tax Claimant, 400 Plaza Building,  
Sacramento 14, California, 1100 South Flower  
Street, Los Angeles 15, California.

Filed: January 24, 1949.

### The Question Involved

There is no dispute as to the facts. But two questions are involved in the appeal, to wit:

#### Point I.

"Is a corporation which succeeds to a partnership required to pay unemployment insurance contributions on the first \$3,000.00 of wages paid by the corporation, when the sole change in the busi-

ness is one of legal entity and when in the same calendar year, the predecessor partnership had already paid unemployment insurance contributions on the first \$3,000.00 paid to any one worker?"'

### Point II.

Do the decisions of the Appellate Department of the Superior Court of San Francisco, on review from judgments of the Municipal Court, being decisions on the California Employment Tax and its application, bind on the Federal Court as to the California Law?

#### Points Relied Upon by Appellant

In support of its position that the debtor is required to pay tax on the first \$3,000.00 in wages paid by it regardless of that limitation on what is considered as taxable wages having been reached by the predecessor partnership the State of California relies on the following points:

(1) That the corporation was a new "employing unit" and a new and different "employer" as defined by the Unemployment Insurance Act and that the pre-existing partnership cannot be considered together with the corporation, to constitute but one "employer" as found by the court.

Unemployment Insurance Act (3 Deering's General Laws Act 8780D) Sections 9, 8.5, 11, 37 and 44.2(B).

(2) That as a new "employer" the debtor corporation was required to pay tax on the first \$3,000.00 in wages paid by it to any worker regard-

less of wages paid to the worker by the partnership. (*ibid.*)

The above statement is agreed to.

FRED N. HOWSER,  
Attorney General.

CHARLES W. JOHNSON,  
Deputy Attorney General.

WILLIAM L. SHAW,  
Deputy Attorney General.

VINCENT P. LAFFERTY,  
Deputy Attorney General.

By /s/ VINCENT P. LAFFERTY,  
Attorneys for Tax Claimant, State of California,  
Department of Employment.

/s/ RUPERT B. TURNBULL,  
Counsel for Debtor.

/s/ GEORGE GARDNER,  
Receiver.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 24, 1949.

United States District Court, Southern District of California, Central Division

No. 45452-PH—Bkcy.

In the Matter of  
**FRED S. RENAULD & CO., a Corporation,**  
Debt

## CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 10, inclusive, contain the original Agreed Statement on Appeal Pursuant to Rule 76 F.R.C.P. which constitutes the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amounted to \$1.60 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 28th day of February, A.D. 1949.

[Seal] EDMUND L. SMITH,  
Clerk.

By /s/ THEODORE HOCKE,  
Chief Deputy.

[Endorsed]: No. 12198. United States Court of Appeals for the Ninth Circuit. State of California, Department of Employment, Appellant, vs. Fred S. Renauld & Co., Debtor, and George Gardner, Receiver of the Estate of Fred S. Renauld & Co., Debtor, Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 1, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

No. 12198

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE  
NINTH CIRCUIT

STATE OF CALIFORNIA, Department of  
Employment,

*Appellant,*

v.

FRED S. RENAUD & CO., Debtor, and  
GEORGE GARDNER, Receiver of the  
Estate of FRED S. RENAUD & CO.,  
Debtor,

*Appellees.*

**BRIEF FOR APPELLANT**

Appeal From the United States District Court for the  
Southern District of California  
Central Division

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CHAS. W. JOHNSON,  
Deputy Attorney General

VINCENT P. LAFFERTY,  
Deputy Attorney General

400 Plaza Building  
Sacramento 14, California

*Attorneys for Appellant, State of  
California, Department of Employment*



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No. 12198

IN THE  
UNITED STATES  
CIRCUIT COURT OF APPEALS  
FOR THE  
NINTH CIRCUIT

STATE OF CALIFORNIA, Department of  
Employment,

*Appellant,*

v.

FRED S. RENAUD & CO., Debtor, and  
GEORGE GARDNER, Receiver of the  
Estate of FRED S. RENAUD & CO.,  
Debtor,

*Appellees.*

**BRIEF FOR APPELLANT**

**STATEMENT OF CASE AND JURISDICTION**

The within case arises on an agreed statement on appeal pursuant to Rule 76, F. R. C. P.

This is a proceeding under Chapter XI of the Bankruptcy Act. An order confirming the debtor's plan of arrangement has been duly entered. The State of California through its Department of Employment filed its claim in the amount of \$1,503.98 interest, for taxes arising under the Unemployment Insurance Act.

Objections to the claim were jointly filed by the debtor and receiver and, after hearing, the referee allowed the claim except for the amount of \$454.99.

The amount disallowed represents the tax claimed as due from the debtor based upon wages paid by it to certain employees after its incorporation on July 1, 1946. These employees had (prior to incorporation) been employees of a partnership consisting of Fred S. and Naomi Renauld, and the partnership had, during the year 1946, paid tax on the first \$3,000 in wages paid to each employee.

Upon incorporation, the debtor considered that no further tax need be paid upon wages to employees who had during the partnership operations (and during the calendar year) received \$3,000. The tax claimant, State of California, assessed the tax upon the theory and contention that upon incorporation the debtor became a new employer and was required to pay tax measured by the first \$3,000 paid to any of its employees regardless of tax paid on any amount paid by the predecessor partnership to the same employees.

The referee ruled that in the calendar year 1946, the partnership and the corporation were one "employer" under the California Unemployment Insurance Act and that the corporation was not required to start anew the \$3,000 limitation upon incorporation on July 1, 1946.

Upon petition for review of the order of the referee, the Judge of the United States District Court affirmed

the order of the referee and adopted the findings of fact and the conclusions of law of the referee as those of the United States District Court.

### **STATEMENT OF FACTS**

On July 1, 1946, the debtor corporation took over a business which was at the time operated by a partnership composed of Fred S. Renauld and his wife (Tr., pp. 3, 4). There was no change in the type of the business or the place of business after assumption thereof by the corporation and the actual management was conducted by the corporation through and by its sole stockholder Fred S. Renauld in the same manner as it had been conducted during the partnership operations (Tr., p. 4). The same employees, in general, performed services for the corporation as performed services for the partnership; and the taxes both before and after July 1, 1946, all relate to the calendar year 1946 (Tr., p. 4), the reserve account of the partnership with the appellant was transferred to the corporation and the rate of contribution or merit rating of the partnership was assigned to the corporation (Tr., p. 4). In the calendar year 1946, the employment of the persons who had worked for the partnership and who continued to work for the corporation was considered as one employment by the corporation (Tr., p. 4). The corporation had taken the position that when any one of its employees had been paid the sum of \$3,000 as an employee of the business here involved in the calendar year 1946, either before or after the

corporation took over the business from the partnership, that then and in that event, the corporation was not liable for contributions under the California Unemployment Insurance Act on any further amounts paid to such employee in excess of such sum of \$3,000 in said calendar year (Tr., p. 5). The appellant took the position that the corporation was liable for contributions under the statute on the whole of the first \$3,000 paid by it to any one of its employees in the calendar year of 1946, and subsequent to the first day of July of such year, notwithstanding the fact that such employee had been paid the whole or part of such sum of \$3,000 as an employee of the business involved in such calendar year and before the corporation took over the said business from the partnership on July 1, 1946 (Tr., p. 5). In the claim filed by the appellant in the debtor proceedings, there was included the sum of \$454.99 which appellant asserts was owing by the corporation because of the fact that it had not paid contributions under the California Unemployment Insurance Act on the whole of the first \$3,000 which it had paid to each of its employees after they became employees of the corporation on July 1, 1946 (Tr., p. 5).

#### **SPECIFICATION OF ERRORS**

Appellant contends:

1. That the judgment of the court below in affirming the order of the referee disallowing that portion of the claim which represents the tax assessed on the first \$3,000 in wages paid by the corporation was erroneous

and improper under the statutes of the State of California.

2. That the conclusion of the court below that it was bound to follow an unreported decision of the superior court of the state and an unreported decision of the appellate department of the superior court was erroneous.

## APPELLANT'S ARGUMENT

### I

The judgment denying a portion of the claim is in error. The corporation became a new employing unit upon succeeding to the partnership and should have paid taxes on the first \$3,000 of wages paid by it to any worker during the same calendar year.

In deciding the purely legal question involved, the court will be required to place a construction upon certain terms defined in the Unemployment Insurance Act (3 Deering's General Laws, Act 8780D). Accordingly, these terms and definitions will be set forth herein, in their pertinent parts.

The Unemployment Insurance Act establishes an excise tax on the right to employ.

*Stewart Machine Co. v. Davis*, 301 U. S. 548, 81 L. Ed. 1279;

*Gillum v. Johnson*, 7 Cal. (2) 744, 63 P. (2) 810.

The tax is measured by wages paid to persons performing services in employment covered by the statute (Section 37, Unemployment Insurance Act).

Not all amounts paid as wages, however, are taxable.

The statute itself excludes from the definition of the term "wages" remuneration in excess of \$3,000 paid to any one worker by "an employer" in any calendar year.

"Sec. 11. (a) except as hereinafter in this section provided the term "wages" means:

(1) All remuneration payable for personal services, \* \* \*."

"(c) If, when, and during such time as the definition of the term 'wages' as contained in the Federal Unemployment Tax Act excludes from 'wages' any one or more of the following types of payments, then such type or types of payments as are so excluded shall likewise be excluded from the definition of wages as contained in subsection (a) of this section:

(1) That part of the remuneration which, after remuneration equal to three thousand dollars (\$3,000) has been paid to an individual by an employer with respect to employment during any calendar year is paid after December 31, 1939, and prior to January 1, 1947, to such individual by such employer with respect to employment during such calendar year; or that part of the remuneration which, after remuneration equal to three thousand dollars (\$3,000) with respect to employment after 1938, has been paid to an individual by an employer during any calendar year after 1946, is paid to such individual by such employer during such calendar year;".

The federal exemption from taxation upon wages in excess of \$3,000 is contained in Section 1607(b) of the Federal Unemployment Tax Act (Internal Reve-

nue Code 1607(b)(1)), and is reflected in Treasury Regulations Section 403.227 relating to "wages."

The \$3,000 limitation on what constitutes wages as above noted, however, is a limitation which may be taken advantage of only by "an employer." Nothing is said in the statute which would sanction use of the limitation by the successor of an employer in the manner here sought. The limitation was utilized by the partnership and properly so. The propriety of its attempted use by the corporation (based upon wages paid by the partnership) is neither apparent from the statute, wherein it defines the terms "employer" "employing unit," nor from general principles of law which clearly distinguish between a partnership and a corporation as a legal entity.

Section 9 of the statute defines the term "employer" in part as follows:

Section 9 "Employer" means:

"(b) Any individual or employing unit which acquired the organization, trade or business, or substantially all the assets thereof, of another which at the time of such acquisition was an employer subject to this act."

"(c) 'Employing unit', as used in this act, means any individual or type of organization, including any partnership, \* \* \* or corporation whether domestic or foreign \* \* \*."

Lest any doubt exist as to the intention of the Legislature to differentiate clearly between a partnership and a corporation as an employing unit, the statute

in Section 8.5 thereof separately defines "employing unit" in pertinent part:

"Sec. 8.5. 'Employing unit,' as used in this act, means any individual or type of organization, including any partnership, association, trust, estate, joint stock company, insurance company, corporation whether domestic or foreign, and the receiver, trustee in bankruptcy, trustee or successor thereof, and the legal representative of a deceased person, which has, or subsequent to January 1, 1936, had, in its employ one or more individuals performing services for it within this State \* \* \*."

No contention can successfully be made in this matter that there is no difference in law between a partnership and a corporation. The one is an association of two or more persons to carry on a business, the other is an artificial person created by law. Each, however, may be an employer required to pay unemployment insurance taxes. Section 37 of the Unemployment Insurance Act provides:

"(a) Employer contributions to the unemployment fund shall accrue and become payable by *every employer* for each calendar year in which he is subject to this act, with respect to wages paid for employment. Such contributions shall become due and be paid to the commission for the unemployment fund by *each employer* in accordance with this act and shall not be deducted in whole or in part, from the wages of individuals in his employ." (Emphasis supplied.)

The use of the words "every employer" and "each employer" in the above quoted section considered in

connection with the definition of "employer" and "employing unit" as heretofore set forth indicate a clear intention that each separate entity enumerated by the statute as an "employing unit" should be subject to making contributions as provided by law, which includes payment of taxes on the first \$3,000 paid as wages to any one worker in the calendar year.

In addition to the already enumerated sections of the statute showing a clear differentiation between a partnership and a corporation as employing units under the Unemployment Insurance Act there is a regulation of the Department of Employment, which administers the statute, directly in point. Of this regulation the court is entitled to take judicial notice.

*Anders v. State Board of Equalization*, 82 Cal. App. (2) 88, 98, 185 P. (2) 883;

*Allen v. Industrial Accident Commission*, 3 Cal. (2) 214, 43 P. (2) 787;

*Wood v. Kennedy*, 117 Cal. App. 53, 60, 3 P. (2) 366.

The regulation referred to is Regulation 65, California Administrative Code, Title 22, which provides:

"If remuneration paid for subject employment performed for an employer during any calendar year exceeds \$3,000, the taxable wage shall not include that part of such remuneration which is in excess of the first \$3,000 paid. If the employee works for more than one employer during the calendar year, each of his employers shall include as wages the first \$3,000 paid to such employee with respect to subject employment during such calendar year \* \* \*." (Emphasis supplied)

It is submitted that the interpretation placed upon the statute by the administrative agency charged by the Legislature with the duty of administering it is entitled to great weight, and that the court should not depart from such construction unless it is clearly erroneous or unauthorized.

*Coca Cola Co. v. State Board of Equalization,*  
25 Cal. (2) 918, 156 P. (2) 1;  
*National Labor Relations Board v. Hearst Publications,* 322 U. S. 111, 64 Sup. Ct. Rep. 851.

In the last cited case Mr. Justice Rutledge stated for the court:

“\* \* \* Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the statute. *Norwegian Nitrogen Products Co. vs. United States*, 288 U. S. 294; *United States vs. American Trucking Associations Inc.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the Statute must determine it initially, the reviewing court’s function is limited. \* \* \*.”

Appellant submits that the clear and proper interpretation of the statute requires that a corporation which succeeds to the business of a partnership be considered as a new employer required to pay taxes on wages paid to any one employee up to the amount of \$3,000 in any calendar year, regardless of any amounts paid by a predecessor.

The corporate form of existence obviously was chosen by the debtor to avoid certain liabilities attaching to continued operation as a partnership. In accepting the advantages of this form of business entity the debtor should likewise be required to accept its disadvantages. In equity the business should not be permitted to shed its characteristics and liabilities as a partnership and at the same time cling on to advantages properly enjoyed by the partnership in order to avoid a tax liability. This is especially true in the absence of express statutory authority so to do, which authority does not exist in this case.

It is further submitted that were the Legislature, in its wisdom, to have intended that a successor employer should enjoy the benefits of amounts paid to workers by the predecessor, with regard to the \$3,000 limitation on taxable wages, it would have said so. The very omission of language rendering non taxable such wages and failing to provide that wages of the predecessor might be "tacked on" to wages paid by the successor employer is a significant guide to the construction of the statute which lends weight to the fact that not only was such "tacking on" not provided for, but, in fact, was not intended.

To hold that a successor corporate employer and a predecessor partnership employer constituted but "one employer" under a tax statute and thus relieve the corporation of a tax liability is to ignore the clear terms of the statute which, far from exempting successor employing units, expressly declares that "each

employer" and "every employer" shall pay the tax on wages paid by it as defined by statute (i.e. up to the first \$3,000 in wages paid to any worker).

Appellant is not unmindful that the court below was impressed by the identity of actual ownership, the identity of the workers involved, the identity of actual management and the identity of the business transacted after incorporation with those factors as they existed during the partnership operations, in issuing judgment denying a part of the appellant's claim. The appellant is not so impressed and respectfully submits that this court should not be so impressed.

The factors mentioned are not without importance with reference to the question of whether the predecessor's reserve account should be transferred to the successor. The statute enumerates many of these factors (Unemployment Insurance Act, Section 41.5) as grounds for transfer of the reserve account which transfer was made in this case. The statute provides that when these factors exist, the successor employer may have the benefit of the merit rating or lowered rate of contribution held by the predecessor (*ibid.*) and this was accomplished in this case.

Nothing, however, is said in the statute about these factors constituting grounds for considering a new employing unit and its predecessor as "one employer" for purposes of the \$3,000 limitation on wages subject to the tax. The very silence of the statute in this regard bespeaks, most eloquently, the intention that

these factors not be considered for the purpose involved.

Further cogent evidence of the legislative intent to tax each new employer on the first \$3,000 of wages paid by it, regardless of amounts paid by a predecessor to its workers, is found in Section 44.2(b) of the statute which provides for refunds to workers when employee contributions have been made on amounts in excess of \$3,000 paid to them by more than one employer.

“Section 44.2(b). If by reason of a worker rendering service for more than one employer during any calendar year after the calendar year 1943, the wages of the worker with respect to employment during such year exceed three thousand dollars (\$3,000), the worker shall be entitled to a refund of any amount of tax, with respect to such wages, imposed by section 44, deducted from such wages and paid to the commission, which exceeds the tax with respect to the first three thousand dollars (\$3,000) of such wages received \* \* \*.”

No such provision for refund is made to “an employer” or to “every employer” who, on the contrary is expressly required to pay tax on all wages paid by it up to the amount of the limitation on taxability thereof.

The appellant submits:

(1) That the corporation was a new “employing unit” and a new and different “employer” as defined by statute and that the preexisting partnership cannot

be considered, together with the corporation, to constitute but one “employer” as found by the court below.

(2) That the statute (which enumerates “each employer” and “every employer”) intends that each new entity which succeeds to a business shall pay tax as required on all wages up to the limit on taxability.

(3) That the partnership was dissolved and dead, thus possessing no capacity to assist the corporation which succeeded to it, in the manner here claimed.

(4) That the incidental factors to the change in employing unit, such as control of management, ownership and identity of workers before and after the acquisition is totally irrelevant and unimportant so far as the \$3,000 limit on taxable wages is concerned.

(5) That nowhere in the statute can language be found which would justify the “tacking on” of wages paid by a predecessor in order to avoid a tax liability assessed against the successor.

The appellant concludes and submits that the judgment of the court below denying that part of the tax claim which relates to wages paid by the corporation but which the debtor considered exempt under the \$3,000 limitation, is in error and should be modified by the allowance of the claim in full and as filed by the tax claimant.

## II

The question raised by this point concerns the extent to which, if at all, a decision of the superior court

and a decision of the appellate department of the superior court constitute the rule of decision in federal court under the Federal Rules of Decision Act (Judiciary Act of 1789, Section 34, Rev. Stat. Section 721, 28 U. S. C. A. Section 725) and Section 1, Article IV of the United States Constitution.

The significance of this question is derived from the existence of a single decision from each such forum on the issue before this court.

*California Employment Commission v. Ransohoff's Inc.* (Mun. Ct., S. F., No. 169784, Appellate Department of Superior Court No. 1618, (1944));

*J. F. Barrett and Harry H. Hilp v. California Employment Commission* (Superior Court, S. F., No. 341890, (1945)).

These two decisions constitute the only judicial expression on the question to be found in California law. It is the position of the appellant that their capacity to bind federal courts as precedent is completely negative for the following reasons:

1. Neither case constitutes binding precedent, even in California.
2. Neither settles the law on the subject, even in California.
3. Each erroneously decides the law.
4. They are decisions of a court of first instance, are the only state decisions on the subject and their existence can be determined only by an examination of court records.

**A. This Court Is Not Bound to Follow the Barrett and Hilp Case (*Supra*) in Deciding the Question at Bar**

The cited case was one brought against your appellant in a forum selected by the plaintiff Barrett and Hilp. It involved the question of whether a new entity resulted when a limited partnership succeeded the general partnership of Barrett and Hilp so far as the \$3,000 limitation on amounts considered as "wages" is concerned. The Superior Court of the State of California in and for the County of San Francisco decided no new entity was created. No written opinion deciding the cause exists. No appeal was taken from the judgment.

Preliminarily, the case fails to constitute compelling authority by reason of fundamentally different facts. In the *Barrett and Hilp* case, one partnership was succeeded by another. In the case at bar, the partnership form was entirely abandoned in favor of corporate existence. Secondly, the case fails to constitute compelling authority under the ruling of the United States Supreme Court in *King v. United Commercial Travelers*, 333 U. S. 153, 92 L. Ed. 609 (1948), 68 S. Ct. 488.

The Supreme Court in that case held that a federal court sitting in South Carolina need not follow a court of common pleas decision of that jurisdiction where it did not appear that the decisions of such court were authoritative expositions of that state's "law." The court noted that (as in the *Barrett and Hilp* matter) in future matters between different parties a

common pleas decision does not exact conformity from either the same court or lesser courts and may be ignored by other courts in common pleas without compunction. Of particular significance is the court statement:

“Secondly, the difficulty of locating Common Pleas decisions is a matter of great practical significance. Litigants could find all the decisions on any given subject only by laboriously searching the judgment rolls in all of South Carolina’s forty-six counties. To hold that federal courts must abide by Common Pleas decisions might well put a premium on the financial ability required for exhaustive screening of the judgment rolls or for the maintenance of private records. In cases where the parties could not afford such practices, the result would often be to make their rights dependent on chance; for every decision cited by counsel there might be a dozen adverse decisions outstanding but undiscovered.

“In affirming the decision below, we are deciding only that the Circuit Court of Appeals did not have to follow the decision of the Court of Common Pleas for Spartanburg County. We do not purport to determine the correctness of its ruling on the merits. Nor is our decision to be taken as promulgating a general rule that federal courts need never abide by determinations of state law by state trial courts. As indicated by the Fidelity Union Trust Co. Case, other situations in other states may well call for a different result.”

The *Barrett and Hilp* decision represents but a single opinion of a trial court of the state forum. It

does not even attain to the dignity of a written decision. It is totally unreported. It concludes only the parties to the action in which judgment was rendered.

Appellant submits, accordingly, that it falls directly within the rationale of the *King v. United Commercial Travelers* decision (*supra*) and thus cannot be considered as compelling authority in the case at bar.

**B. The Decision of the Appellate Department of the Superior Court in the Ransohoff Case (*Supra*) Is Not Binding on the Courts of the United States in the Matter at Bar**

The *Ransohoff* action was filed by your appellant against the defendant Ransohoff corporation in the Municipal Court in San Francisco and resulted in judgment for the plaintiff which was appealed to the appellate department of the superior court. The facts of the *Ransohoff* case are virtually identical with those in the matter before this court and, as here, involved the question of whether a new entity came into being when a corporation succeeded to a partnership. A memorandum opinion deciding the cause was prepared but has not been included in any of the reports. No further avenue of appeal was open to your appellant.

It may be conceded that the appellate department of the superior court is a court of final jurisdiction on appeal from the judgment of the municipal court.

*Nelson v. Darling*, 103 Cal. App. 523, 284 P. 1095; *Johnston v. Wolf*, 208 Cal. 286, 280 P. 980.

It is submitted, however, that the effect of the finality of such a judgment is to be found more in the

fact that the judgment of the appellate department of the superior court renders its decision a matter "res adjudicata" rather than a decision to be accorded consideration under the doctrine of "stare decisis."

Research has disclosed but one decision concerning the effect to be accorded a decision of the appellate department of the superior court. In the case *In Re Wiegand*, 27 F. Supp. p. 725, the Judge of the District Court, S. D. California, Central Division (1939) stated:

"In fact, the appellate department is known at the Bar as 'the little supreme court', as to matters within its jurisdiction. Unless its decisions, therefore, should conflict with the district courts of appeal or with the Supreme Court of California, they are binding on all."

The holding of the district court which followed the opinion of the appellate department of the superior court was subsequently reversed by the circuit court of appeals, for the 9th circuit in *Bank of America v. Sampsell*, No. 9472 (1940), 114 F. (2) 211.

Despite the appellation generously accorded the Appellate Department of the Superior Court as being the "little supreme court," it is respectfully submitted that the opinions of this court are not binding upon the District Courts of Appeal, the Supreme Court or, indeed, upon the Superior Courts or Appellate Department thereof in any county outside of the one in which the opinion was rendered. In addition, these opinions are not required by law to be reported, those

which are reported reach that state solely at the whim of the department issuing the decision.

The *Ransohoff* decision was not among those so dignified. It is an unreported decision and your appellant submits that this fact renders it subject to the same objection which was made in *King v. United Commercial Travelers* (supra).

The *Ransohoff* decision represents the only decision in California that may lay claim to any vestige of appellate dignity, however slight that vestige may be. Being the only decision on the point by the forum involved, it cannot be said to constitute a “rule of decision” even in California.

Any efficacy which the decision might be said to possess is further diminished by reason of the fact that it is a decision reversing a municipal court judgment which was issued at a time when the jurisdiction of the municipal court in such tax matters was being questioned on appeal in another case. The date of the opinion by the appellate department of the superior court was March 10, 1944. On February 7, 1944, the District Court of Appeal of the State of California decided that in cases in which the defendant denied he was an employer under the Unemployment Insurance Act that the question of the legality of the tax was put in issue. Over this question the municipal court has no jurisdiction.

*California Employment Stabilization Commission v. Municipal Court of the City and County of San Francisco*, 62 Cal. App. (2) 781, 145 P. (2) 361.

Although the district court decision preceded the *Ransohoff* decision by one month, the *Ransohoff* case had been tried in the municipal court over a year prior to its issuance (December 15, 1942), and the appeal in the *Ransohoff* matter was submitted to the appellate department of the superior court one month prior to the issuance of the district court decision (January 14, 1944). Motion to vacate the judgment on grounds of lack of jurisdiction was denied on May 5, 1944. While the pleadings in the *Ransohoff* action do not contain a formal express denial of the allegations that the corporation was an employer subject to the contributory provisions of the Unemployment Insurance Act, the case, so far as the \$3,000 limitation on wages is concerned, was tried on that theory.

The tax claimant in the case at bar has never considered itself bound by the *Ransohoff* decision in view of the later expression by the District Court of Appeal of the State of California.

The appellate department of the superior court could have acquired jurisdiction in the *Ransohoff* case only to the extent that the municipal court possessed jurisdiction.

*Unemployment Reserves Commission v. St. Francis Homes Assn.*, 58 C. A. (2) 271, 137 P. (2) 64.

While some doubt might exist as to whether the municipal court acted without jurisdiction in view of the later district court decision in *California Employment Stabilization Commission v. Municipal Court* (supra), the very existence of this doubt renders the appellate

department decision by the superior court of but scant, if any, compulsion as precedent in federal court.

The efficacy of the decision is further vitiated by its singularity. As was stated by Gibson, District Judge, in *Neff v. Hindeman*, District Court, W. D., Pennsylvania (1948), 77 F. Supp. p. 4:

“\* \* \* It may be conceded that lower court cases may show the law of the state. Where a number of them unite on the same proposition, without contradiction by an appellate court for a long period, it may well be assumed that as the law of the state, it is generally accepted. But ‘one swallow doesn’t make a summer.’ It just seems at least strange if federal judges, themselves sitting in the same state, are required to accept as the law of the state a single decision of a lower court even though their own judgment may be counter to it. \* \* \*”

The Circuit Court of Appeals for the Ninth Circuit has held in a proceeding for reorganization of a corporation that it is not bound by superior court decisions.

In *Woods, et al. v. Deck* (C. C. A. (9) No. 9336),<sup>112</sup> June 7, 1940, where the rights of certain petitioners were predicated upon a decision of the California Superior Court this court stated:

“It remains to consider the claims of the original petitioners. Since their claims and those upon which the judgment was based in the case of *McFaul v. Deck*, supra, involve the same questions, it is clear that if we follow the decision in that case we must hold that they also are creditors of the

alleged bankrupt. *This decision, however, is not binding upon us as an authoritative decision upon the law of California, since it is not a decision of the highest court of the state.* Nevertheless it is in strict accordance with the decisions of that court. (Emphasis supplied.)

The Circuit Court of Appeals for the Eighth Circuit has followed the same view. In *Summers v. Travelers Insurance Co.*, 109 F. (2) 845 (C. A. A. 8, 1940), the court stated :

“The Supreme Court of Missouri has had no occasion to construe the cancellation clause of a policy similar to the clause here involved, and no decision of that court is cited in appellant’s brief in support of his contention that a return of the unearned premium was a condition precedent to the right of cancellation. Certain decisions of the intermediate appellate courts of Missouri are cited, which it is contended support this view. We do not find it necessary to consider whether they lend support to appellant’s contention or not because we are bound by the decisions of the higher court of the state and not by the decision of the intermediate courts. *Hudson, et al., vs. Maryland Casualty Co.*, 8 Cir., 22 F. 2d 791; *Federal Lead Co. vs. Swyers*, 8 Cir., 161 F. 687; *Turner vs. New York Life Insurance Co.*, 8 Cir., 100 F. 2d 193.” (Emphasis supplied.)

In another case arising in the Eighth Circuit, the court in *Anglo American Land Co. v. Lombard*, 132 F. 721, 741, 742, stated :

“A fixed and settled rule of decision in a state court of last resort establishes the law of the state in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority; are not controlling upon the federal courts, because they do not settle the law of the state.”

The Circuit Court of Appeals for the Sixth Circuit adheres to the same view. In *United States Telephone Co. v. Central Union Telephone Co.*, 202 F. 66, 69, that court stated:

“It is clear that the obligation to follow the lead of the state courts do not arise, unless the court to be followed is the court of last resort in the state \* \* \* and particularly so when the lower court opinions are not unanimous or numerous or old enough to show a settled rule.”

Cited to the same effect: *Irving National Bank v. Law*, 9 F. (2) 536, 537, Circuit Court of Appeals 2d Circuit.

The Circuit Court of Appeals for the Third Circuit in *Field v. Fidelity Union Trust Co.*, 108 F. (2) 521, has likewise held in an opinion, which exhaustively discusses the question of what effect is to be accorded a decision of a trial court, that it was not bound by two decisions of the Court of Chancery of New Jersey. Subsequently, however, this circuit court decision was reversed by the United States Supreme Court in *Fidelity Trust Co. v. Field*, 311 U. S. 169, 177 (1940),

where the court held that the decisions of the Court of Chancery of New Jersey were binding upon the circuit court. This ruling, however, goes no farther than to decide just that point.

In *King v. United Commercial Travelers* (*supra*) (1948), the United States Supreme Court stated:

*“The Fidelity Union Trust Company case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions.* This court took pains to point out that the status of the New Jersey Court of Chancery was not that of the usual nisi prius court. It had state-wide jurisdiction. Its standing on the equity side was comparable to that of New Jersey’s intermediate appellate courts on the law side. A uniform ruling by the Court of Chancery over a course of years was seldom set aside by the state’s highest court. And chancery decrees were ordinarily treated as binding in later cases in chancery.” (Emphasis supplied.)

### CONCLUSION

The appellant concludes that the judgment of the court below in affirming the order of the referee which disallowed that portion of the claim representing the tax assessed on the first \$3,000 in wages paid by the corporation was erroneous and improper under the statutes of the State of California and that the conclusion of the court below that it was bound to follow the *Barrett and Hilp* and *Ransohoff* decisions (*supra*) of the intermediate state court was erroneous.

Appellant, accordingly, submits that the judgment should be reversed and the claim allowed as filed.

Respectfully submitted,

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CHAS. W. JOHNSON,  
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Deputy Attorney General  
*Attorneys for Appellant,  
State of California,  
Department of Employment*

No. 12198.

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

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STATE OF CALIFORNIA, Department of Employment,

*Appellant,*

*vs.*

FRED S. RENAUD & Co., Debtor, and GEORGE GARDNER,  
Receiver of the Estate of FRED S. RENAUD & Co.,  
Debtor,

*Appellees.*

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## BRIEF FOR APPELLEES.

Appeal from the United States District Court for the  
Southern District of California  
Central Division

---

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*Debtor.*



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Debtor,

*Appellees.*

---

## BRIEF FOR APPELLEES.

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### Statement of Facts.

The agreed statement on appeal shows all the facts necessary to the consideration of the issue of this appeal.  
[Tr. p. 2.]

"THE LEGAL QUESTION INVOLVED HERE CONCERNING THE CONSTRUCTION AND APPLICATION OF A CALIFORNIA TAX STATUTE HAS AT THE INSTANCE OF THE APPELLANT BEEN DETERMINED BY THE CALIFORNIA COURTS." Not on the theory of *res adjudicata*, but on the principle that where the State Court has determined the construction and application of a State Statute, the same will be accepted and taken as the law of the State when the question is presented in the Federal Court. It appears from the

agreed statement on appeal that the partnership was named Fred S. Renauld & Co., and was composed of Mr. and Mrs. Fred S. Renauld, husband and wife. The corporation of the same name, Fred S. Renauld & Co., Inc., was the incorporation of that business as formerly operated by the partnership. The corporate stock of the corporation was issued under a permit of the California Corporation Commissioner after an agreement between Mr. and Mrs. Renauld that it should be so issued, but that the stock remain the community property of the Renaulds. The entire ownership of the business under the partnership was in the Renaulds. The entire stock interests after the incorporation was in the Renaulds. As stated in Article 3 of the agreed statement on Transcript page 4, it was agreed:

“That there was no change in the type of the business or the place of business after it was transferred to the corporation and that the actual management of the business was conducted by the corporation through and by its sole stockholder Fred S. Renauld in the same manner as it had been conducted during the partnership operations;

“4. That the same employees, in general, performed services for the partnership; that the taxes both before and after July 1, 1946, all relate to the calendar year of 1946;”

The appellant here sought a decision construing and applying the California law here involved. The appellant selected the forum as it was the plaintiff in the case of *California Employment Commission v. Ransohoff's, Inc.* The ultimate opinion and decision in that case, was by the highest court to which the case was appealable. That court was the Appellate Division of the Superior Court, at San

Francisco, California. That fact is conceded by the appellant, page 18, appellant's brief:

“It may be conceded that the Appellate Department of the Superior Court is a court of final jurisdiction on appeal from the judgment of the Municipal Court. (Nelson v. Darling, 103 Cal. App. 523, 284 P. 1095; Johnston v. Wolf, 208 Cal. 286, 280 P. 980.)”

That the question there was the same one as is here is also conceded by the appellant, page 18, appellant's brief:

“The facts of the Ransohoff case are virtually identical with those in the matter before this court and, as here, involved the question of whether a new entity came into being when a corporation succeeded to a partnership.”

The said Ransohoff judgment is a final judgment. After the adverse decision by “the little supreme court” the appellant attacked the decision of the Municipal Court by challenging its jurisdiction to try the case which it had instituted. The result is again conceded in the appellant's brief, page 21, where it says:

“Motion to vacate the judgment on grounds of lack of jurisdiction was denied on May 5, 1944.”

Again it is conceded by the appellant that this appellate division of the Superior Court where its judgment is final is binding. We find this concession on page 19, appellant's brief:

“In the case, *In re Wiegand*, 27 F. Supp., p. 725, the Judge of the District Court, S. D. California, Central Division (1939) stated:

'In fact, the appellate department is known at the Bar as "the little supreme court," as to matters within its jurisdiction. Unless its decisions, therefore, should conflict with the district courts of appeal or with the Supreme Court of California, they are binding on all.'"

If a certified copy of the written opinion in the *Ransohoff* case can be obtained in time, it will be attached to and filed with this brief, otherwise it will be presented at the time of oral argument.

### Conclusion.

After hearing of evidence, the Referee in Bankruptcy decided that the employer was the same and that when the corporation took over in the middle of a calendar year, that he by looking through the form saw the substance, and that it was the same employer, the same employees, the same manager, the same hours, the same working conditions. To hold otherwise would have been to permit double taxation. The District Judge agreed with the Referee and adopted his findings.

We respectfully submit that the court should find both of these judicial officers are correct, and confirm the decision now on review.

Respectfully submitted,

RUPERT B. TURNBULL,  
*Attorney for Debtor, Fred S. Renauld & Co.*

GEORGE GARDNER,  
*Attorney for Receiver for Fred S. Renauld Co.,  
Debtor.*

No. 12198

IN THE  
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STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

*Appellant,*

v.

FRED S. RENAUD & CO., Debtor, and  
GEORGE GARDNER, Receiver of the  
Estate of FRED S. RENAUD & CO.,  
Debtor,

*Appellees.*

---

**APPELLANT'S REPLY BRIEF**

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

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FRED N. HOWSER  
Attorney General

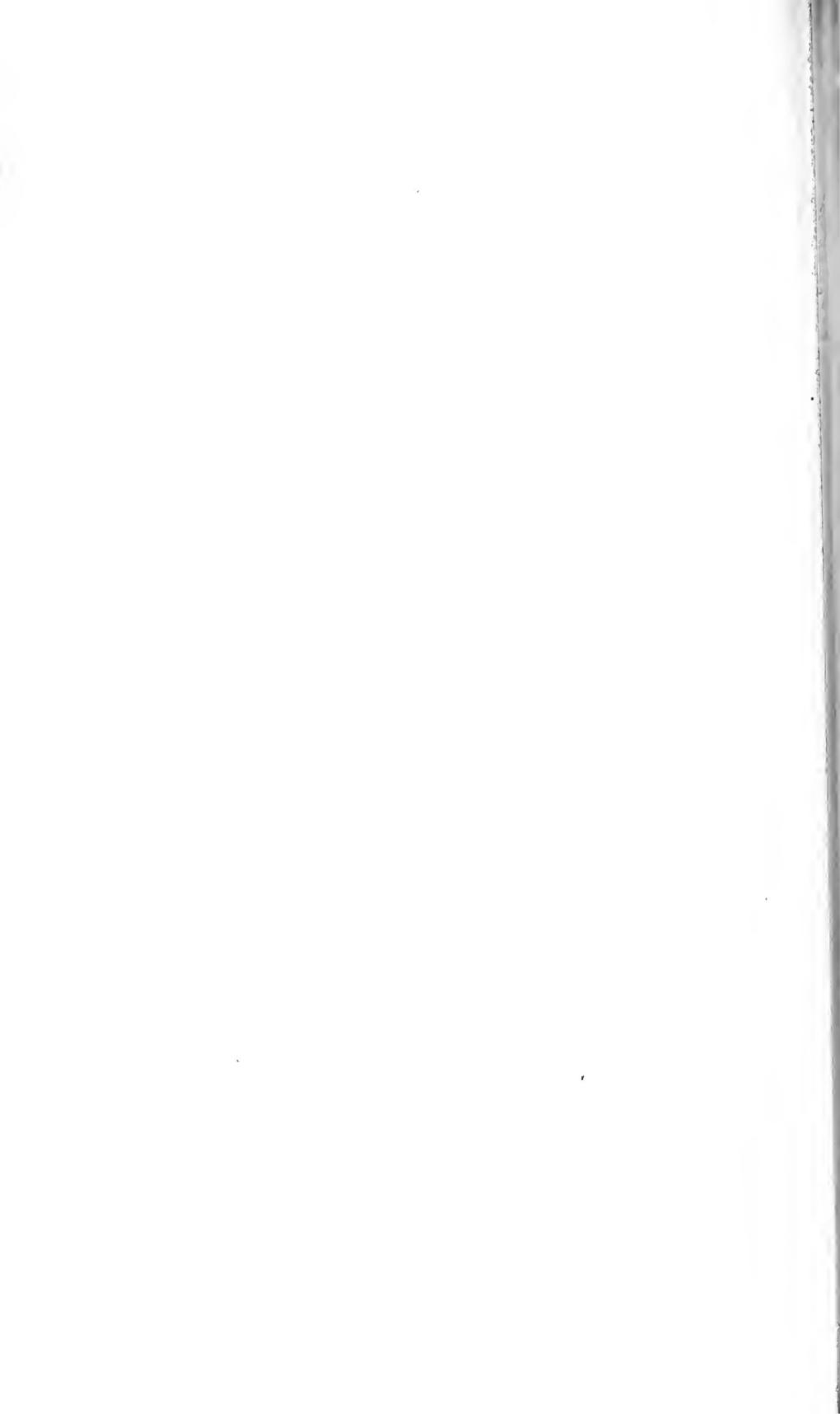
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MAY 26 1948

PAUL P. O'BRIEN,  
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---

**APPELLANT'S REPLY BRIEF**  
**ARGUMENT**

The appellees have not met the issue before this court on its merits, or at all. They have apparently abandoned their former reliance upon the case of *Barrett and Hilp v. California Employment Commission* (Superior Court, San Francisco, No. 341890) which case is not mentioned in the appellees' brief.

In electing to place sole reliance upon the case of *California Employment Commission v. Ransohoff's, Inc.* (Appellate Department of the Superior Court, San Francisco No. 1618), they have devised an argument which, in effect, may be stated as

“Since a Superior Court Appellate Department has decided this matter, in a virtually identical case, the courts of the United States are circumscribed, limited and bound by its judgment.”

Such an argument erroneously assumes that the *Ransohoff* case constitutes the rule of decision which must be followed in federal court and that it correctly decides the law.

1. The argument ignores the fact that the appellate department of the superior court is not binding authority even in California.

2. It completely evades *Bank of America v. Sampsell*, 114 Fed. (2) 211, which disposes of the point with thoroughness. In that case the holding of *In re Wiegand*, 27 F. Supp. 725, was reversed by the Ninth Circuit Court of Appeals, thus setting at naught the reliance of the district judge upon an appellate department ruling despite his generous description of that department as “the little Supreme Court.”

3. It entirely sidesteps the effect of the recent United States Supreme Court decision in *King v. United Commercial Travelers*, 333 U. S. 153, 92 L. Ed. 609, 68 S. Ct. 488, which destroys in definite terms (appellant’s brief, p. 17) the capacity of unreported state court decisions to bind federal courts.

4. It fails even to consider the ruling of the Ninth Circuit Court of Appeals in *Woods et al. v. Deck*, 112 F. (2) 739, 742, wherein this court held that it was not bound by the decision of a California superior

court since it was not a decision of the highest court of the State.

5. It disregards the authority of the eighth, sixth and second circuits of the United States Court of Appeals to the same effect as set forth in:

*Summers v. Travelers Insurance Co.*, 109 F. (2) 845;

*Anglo American Land Co. v. Lombard*, 132 F. 721;

*U. S. Telephone Co. v. Central Union Telephone Co.*, 202 F. 66, 69;

*Irving National Bank v. Law*, 9 F. (2) 536.

6. It omits consideration of the statement by the United States Supreme Court in *King v. United Commercial Travelers* (supra) that “*The Fidelity Union Trust Company case did not, however, lay down any general rule as to the respect to be accorded state trial court decisions \* \* \*.*”

7. While the appellant considers that the *Ransohoff* case was incorrectly decided, does not constitute the rule of decision in this State, and that its capacity to bind this court can adequately be represented only by a zero, it will accommodate the appellees by causing a true copy of this unreported decision to be included in the appendix to this reply brief.

## CONCLUSION

It is respectfully concluded and urged that the judgment of the court below was erroneous in disallowing that portion of the tax based upon wages paid by the debtor corporation up to the first \$3,000. It is further submitted that the conclusion of the district court that it was bound by the two unreported decisions of the California superior court was erroneous.

Appellant, accordingly, prays that the judgment be reversed and that the tax claim be allowed in full and as filed.

Respectfully submitted.

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## APPENDIX

IN THE SUPERIOR COURT OF THE  
STATE OF CALIFORNIA  
IN AND FOR THE  
CITY AND COUNTY OF SAN FRANCISCO

CALIFORNIA UNEMPLOYMENT COMMISSION (formerly Unemployment Reserves Commission),

Plaintiff and Respondent,  
vs

RANSOHOFF'S INC., a CORPORATION, et al.,  
Defendants and Appellants.

No. 1618  
APPELLATE  
DEPARTMENT

### MEMORANDUM OPINION

The California Employment Commission claims that the employees of Ransohoff's, Inc., a corporation, were employed by two different employers during the year 1940.

It appears that Robert and James Ransohoff were copartners in a business known as Ransohoff's. They jointly managed the business and each owned fifty percent of it.

On August 1st, 1940, the business was changed into a corporation. The brothers Ransohoff each owned fifty percent of the corporate stock and they continued to conduct and manage the affairs of the business in precisely the same manner as under the partnership arrangement. As is usual in such cases, the corporation acquired the entire organization, trade, business, assets and liabilities of the partnership.

Upon completion of the corporate structure the California Employment Commission was duly informed and the corporation assumed the business of the partnership for the purpose of determining its rate of contributions under the terms of the California Unemployment Insurance Act "as if no change with respect to such separate account, actual experience and pay rolls had occurred and with the same effect for such purpose as if the operations" of the business had always been conducted by the corporation. It is to be noted that under the corporation, the positions, salaries due, and other matters having to do with the employees continued as before.

The California Employment Commission sought to collect from the newly formed corporation alleged delinquencies in contributions for the last five months of the year 1940 upon the theory that the corporation was a separate entity. The corporation had paid all contributions except those levied on the wages of employees who received in excess of \$3,000. per year. Both appellants and respondent concede the law does not contemplate contributions on wages in excess of \$3,000. per annum paid to any one employee by a single employer. The Commission does contend, however, that the employees of Ransohoff's were paid by two different employers during the year 1940, namely, the partnership and the corporation. The lower court upheld this contention and judgment for the plaintiff was entered accordingly.

The question to be determined, therefore, is whether it was the intention of the legislature, as embraced within the Unemployment Insurance Act and particularly Section 41.5 thereof, that Ransohoff's, Inc.,

a Corporation, and successor to Ransohoff's a partnership, be relieved of the obligation of making contributions on wages paid to employees who previously, as employees of Ransohoff's, the partnership, and within the same calendar year received \$3,000. in wages.

The California Employment Commission claims that employees of Ransohoff's who received more than \$3,000. in 1940, got it from two different employers because the manner of conducting the business was changed on August 1st, 1940, from a partnership to a corporation. The Commission bases its contention on Section 11 (c) 1. 38, 44.2.

The California Unemployment Insurance Act was designed to benefit persons unemployed through no fault of their own. It provides that funds be set aside for systematic application to the general welfare of citizens of the State in order that involuntary unemployment and its resulting suffering be reduced to a minimum. The act is part of a national plan of unemployment reserves and social security. Its beneficial social and economic aspects require no further discussion for the purposes of the case before us.

The Congress and our State legislature eliminated from the social security scheme earnings in excess of \$3,000. per year. Therefore, neither an employer nor an employee has to make any contribution on account of earnings above the \$3,000. limitation. Accordingly, no benefits are paid upon any excess earnings. (Sec. 38, 44.2, 41, 53, 54).

State unemployment statutes are part and parcel of the federal system. Thus, the provisions in the various state acts appear to be in substantial conformity.

In construing the act we are met, not unexpectedly, by a paucity of precedent and decision. This far-seeing legislation, designed to broaden the scope of private charity and purely local unemployment relief, but recently came into existence.

In the interpretation of particular words, phrases or clauses of a statute, the entire substance thereof or that portion having relation to the subject under review should be looked into to determine the scope and purpose of a particular provision therein of which such words, phrases or clauses form a part. Wallace vs Payne, 197 Cal. 539, 544.

With this cardinal rule of construction in mind, it is difficult for me to follow the reasoning relied upon by counsel for the State.

Section 41.5 of the Act provides that when an employing unit acquires the organization of an employer and continues that organization it is in the exact position of the first employer in so far as the determination of the rate of contribution is concerned.

In the case before us, the only change in the employing unit is one of form and not of substance. There is no change in the nature of the business and the manner of conducting it is the same. The two employers under the corporate structure each owned fifty percent of the stock, just as each of the partners owned fifty percent of the business. The employees presumably are doing the same work.

I do not believe, nor is it urged, that where one business or venture, whether it be corporate in character or otherwise, is succeeded by another the \$3,000. limitation must be universally applied. The language of the act, in my opinion, contemplates that given two different employers each should be considered separately. However, I feel that the change

from a partnership to a corporate entity of the employing unit in this case does not create any new employment within the meaning of the act. To hold otherwise appears to me to be contrary to the result which the legislature intended to achieve. It is true that the act refers to "an employer" or "such employer" but this, it would seem, was designed to do nothing more than obviate unnecessary complication in the administration of the law.

Most of the authorities cited by counsel have to do with opinions of Commissions in various States. Although I do not regard the citations as binding upon this court, they are, nevertheless, persuasive and the reasoning appears to be sound.

I am, therefore, of the opinion that a change from a partnership form to a corporate form in this instance is not a real change as contemplated within the terms of the act and that the successor corporation and the predecessor partnership are the same. Accordingly, the judgment of the lower court should be reversed.

Dated: March 10th, 1944.

EDWARD P. MURPHY, Judge.

WE CONCUR:

ROBERT L. McWILLIAMS, Judge.

FRANKLIN A. GRIFFIN, Presiding Judge.



COPY

No. 12198

IN THE  
**UNITED STATES COURT OF APPEALS**  
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,

*Appellant, Petitioner,*

v.

FRED S. RENAUD & CO., Debtor and  
George Gardner, Receiver of the Estate  
of Fred S. Renauld & Co., Debtor,

*Appellees.*

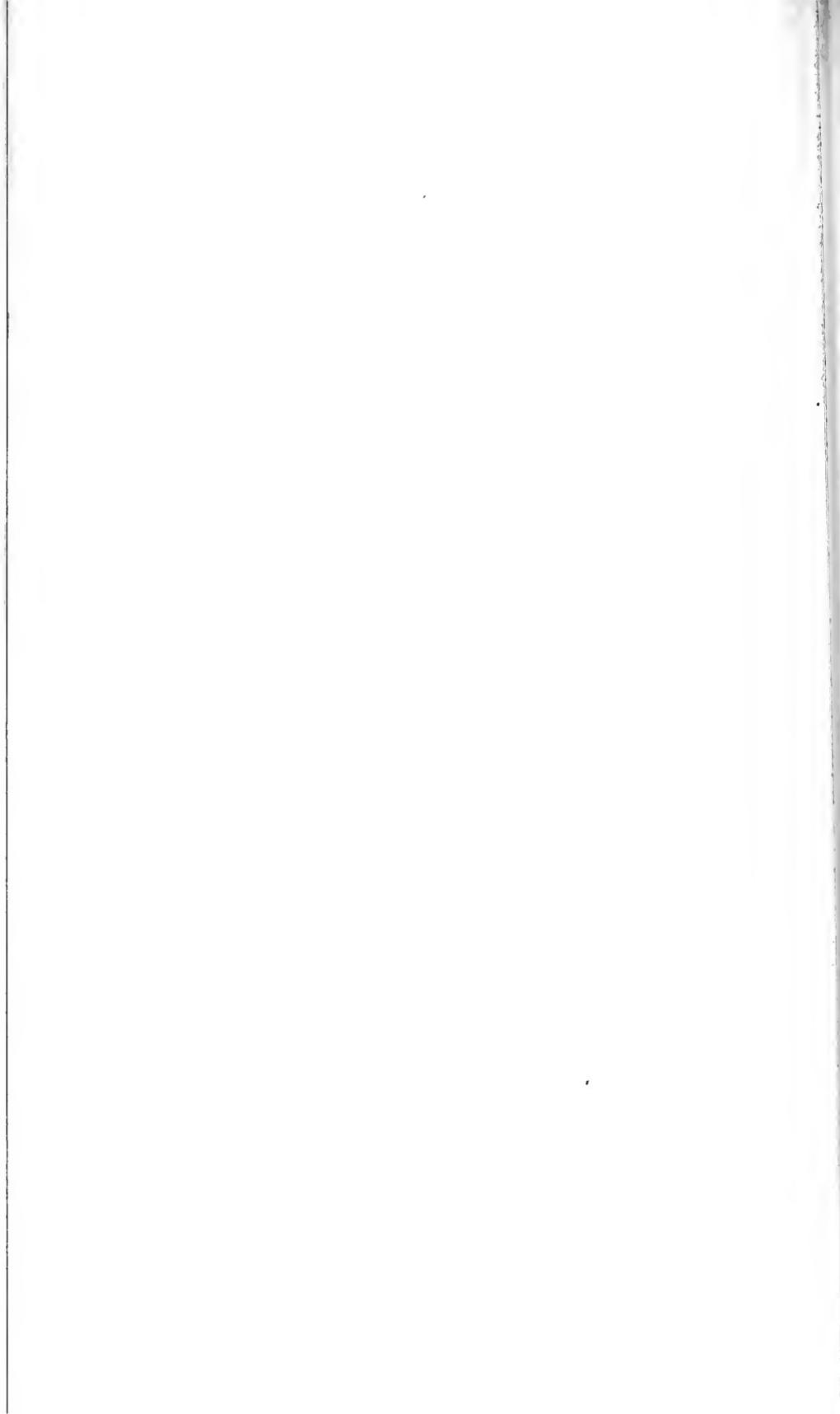
**PETITION FOR REHEARING**

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No. 12198

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STATE OF CALIFORNIA, DEPARTMENT OF EMPLOYMENT,  
*Appellant, Petitioner,*

v.

FRED S. RENAUD & CO., Debtor and  
George Gardner, Receiver of the Estate  
of Fred S. Renauld & Co., Debtor,  
*Appellees.*

**PETITION FOR REHEARING**

The Appellant State of California, Department of Employment, in the interests of substantial justice and as hereinafter set forth, hereby respectfully petitions this court for a rehearing in the within appeal which was ordered dismissed by opinion of the court filed October 3, 1949.

**STATEMENT OF FACTS**

The appellant herein filed an appeal from an order of the district court upon a petition for review affirming an order of a referee in bankruptcy. This appeal was taken for the purpose of securing, on behalf of the State of California and its taxing agencies, an authoritative precedent upon a vitally important question of law.

In so doing and through inadvertence the appellant miscalculated the procedural necessities involved and failed to comply with those specified in Section 24 (a) of the Bankruptcy Act, 11 U. S. C. A. Sec. 47 (a), and the bankruptcy rule of this court. Under these circumstances, the monetary amount actually involved in this appeal being \$44.01 less than that which would suffice to authorize appeal as a matter of right, after briefs were filed upon the merits of the case and hearing thereon was had, this court, pursuant to its unquestioned discretion so to do, ordered the appeal dismissed.

#### GROUNDS OF PETITION FOR REHEARING

Your appellant bases its petition that this court exercise its discretion to consider the notice of appeal filed with the District Court as an irregular application to the Court of Appeals for the Ninth Circuit for leave to appeal, on the following grounds:

1. While such notice was procedurally irregular, this court, as pointed out in the opinion herein, is not without jurisdiction to treat such filing as an informal substitute for the petition for allowance of an appeal prescribed by Section 24 (a) of the Bankruptcy Act.

*Reconstruction Finance Corporation v. Prudence Group*, 311 U. S. 579 (1941).

2. Substantial justice requires that a decision be rendered on the merits of the question involved.

- (a) The interpretation placed by appellant upon the \$3,000 limitation on wages considered taxable is a basic one involving 236,625 registered employers in the State of California alone.
- (b) In the year 1949, your appellant, Department of Employment—which is but one of the taxing agencies of the State of California which such a decision would affect—has filed tax claims in 950 individual bankruptcy proceedings pursuant to the Unemployment Insurance Act (3 Deering's General Laws of California, Act 8780D). In each adjudicated bankruptcy proceeding that contemplates the appointment of a trustee to operate the business of a debtor, the same issue as is presented by the appeal arises, namely, whether a new entity comes into existence. The construction of the statute sought to be secured by the within appeal is basic in appellant's administration of the Unemployment Insurance Act and affects the taxes assessed against all bankrupt estates in which a change of entity has occurred.
- (c) Your appellant, Department of Employment, alone, presently has tax claims on file on behalf of the State of California in 1,400 pending bankruptcy proceedings.
- (d) There is no authoritative decision of a court of the State of California by which courts of bankruptcy in this State may be guided. The cases of *J. F. Barrett and Harry H. Hilp v.*

*California Employment Commission*, Superior Court, San Francisco No. 341890 (1945), and *California Employment Commission v. Ransohoff's, Inc.*, Municipal Court, San Francisco No. 169784, Appellate Department of the Superior Court, San Francisco No. 1618 (1944), are the only judicial expressions upon the merits of the question neither of which is binding authority upon federal courts sitting in California under the principles of *King v. United Commercial Travellers*, 333 U. S. 153, 92 L. Ed. 609 (1949), 68 S. Ct. 488. (Appellant's Opening Brief, pp. 16-25.)

- (e) Substantial justice in the administration of bankruptcy estates requires a decision by this honorable court on the merits of the appeal to achieve uniformity of decision by the various referees in bankruptcy and district courts confronted therewith to the end that bankrupt estates be not burdened with taxes erroneously assessed. The frequency with which this problem arises in construction of the Federal Bankruptcy Act indicates the propriety of a decision on the merits by a federal court even though no reliable assistance is afforded by the state forum. It is respectfully submitted that absence of specific and relevant state decisions should not deter consideration of the problem by this

court nor should it operate to require the parties to litigate the matter in the courts of California. *Meredith v. Winter Haven*, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943).

- (f) Despite the small amount of tax involved in this particular appeal, the problem presented by the merits is one of major importance in the administration of the social legislation sought to be construed, particularly with reference to the Federal Bankruptcy Act. It is respectfully urged that this appeal does not fall within the classification of those which are "too unimportant to be entitled to further consideration by an appellate court, regardless of issues involved" (Senate Hearings on H. R. 8046, 75th Congress, 2d Session (1937-1938), 105 commenting on the reason for the \$500 limitation). The scope or importance of the issue may not be judged adequately or at all by the amount herein involved. The purpose of the proviso relating to the \$500 limitation is to exclude "the appeal of trifling and inconsequential disputes" (2 Collier on Bankruptcy, 14th Ed., 799, par. 24.42, Ch. VII). As hereinbefore indicated, despite the \$44.01 lack of sufficiency, the issue presented by the appeal is neither "trifling" nor "inconsequential."
3. While appellant's subsequent diligence in prosecuting the within appeal is not urged as a substitute

for its proper initiation, appellant respectfully addresses the court's attention to the reasons assigned by it for the allowance of an appeal, seasonably applied for, in *Holmes v. Davidson* (C. C. A. 9, 1936), 84 F. (2) 111 as follows:

“\* \* \* We will allow the appeal to this Court. In so doing we are influenced by the fact that the matter has been fully presented by briefs and transcript and argument on the merits.”

The exercise by this court of its discretion, “where the scope of review is not affected, to disregard such an irregularity in the interests of substantial justice” (*Reconstruction Finance Corp. v. Prudence Group* (supra) would not jeopardize the rights of the appellees who assisted in the preparation of the agreed statement pursuant to Rule 76, Federal Rules of Civil Procedure (28 U. S. C. A. following Sec. 723c), and appeared in this court by briefs and it would provide an important aid to the solution of a frequently met problem in the administration of important federal legislation.

## CONCLUSION

While appellant is not aided by special equities in the form of mistaken reliance upon incorrect legal precedent as in *Reconstruction Finance Corp. v. Prudence Group* (supra) it respectfully and for the reasons assigned petitions for rehearing of the order dismissing the appeal and the allowance thereof in the interests of substantial justice.

Respectfully submitted.

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CHAS. W. JOHNSON  
Deputy Attorney General

VINCENT P. LAFFERTY  
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Employment*



No. 12199.

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

---

BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

APPELLANT'S BRIEF.

---

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No. 12199.

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

---

BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## APPELLANT'S BRIEF.

---

### Opinions Below.

The District Court did not write an opinion on any phase of the case.

### Jurisdiction.

The District Court asserted and attempted to exercise jurisdiction under Title 18 U. S. C. A., Section 3231. It is appellant's contention that the District Court could not exercise its jurisdiction under said Title and Section in respect to the offenses charged in the Indictment,—the said offenses being alleged violations of Title 38 U. S. C. A., Sections 697 and 715—since the penal provisions of Section 715 of Title 38 are not incorporated into Section 697 of said Title and, therefore, the acts charged against appellant do not constitute an offense against the United States.

This Court has jurisdiction upon appeal under Title 28, U. S. C. A., Section 1291.

### Statutes Involved.

The statutes involved are the World War Veterans' Act of 1924, and the Servicemen's Readjustment Act of 1944, as amended, 38 U. S. C. A., Sections 694, 697 and 715. Incidentally involved is Section 3231 of Title 18, U. S. C. A., in respect to whether, under said Section, the District Court had power to render the judgment involved in this appeal.

The pertinent portions of Sections 694, 694a, 697 and 715 of Title 38 U. S. C. A. are set forth in the brief.

### Questions Presented.

Appellant will rely upon all of the points contained in her Statement of Points on Appeal. [R. Vol. 1, pp. 34, 35.] These and other points are affirmatively stated as follows:

1. The Acts charged in the Indictment do not constitute an offense by appellant against the United States.
2. The District Court has no jurisdiction to try and enter judgment against appellant for an offense which is not clearly provided by law.
3. The Indictment shows on its face that if an offense against the United States has been committed, the Bank of America is the principal; but since the Bank is not charged with any offense although it made the alleged false certificates, the appellant cannot be convicted and punished as the aider and abettor of such offense.

4. The evidence adduced at the trial is insufficient to sustain the allegations of the Indictment, or to support the verdict and judgment.

5. The District Court erred in holding and requiring as a condition of probation, that appellant make restitution to twelve supposed veterans of sums aggregating \$4200 as and for loss and damage caused by offenses charged in the Indictment for which no convictions were had.

6. The District Court erred: (a) In denying appellant's motion for a judgment of acquittal; (b) in overruling appellant's motion for arrest of judgment; and (c) in overruling appellant's motion for a new trial.

#### **Statement of the Case.**

Appellant was indicted on seventeen (17) counts for the alleged offense, as charged in each of said counts, that she:

" . . . did knowingly cause to be made a false certificate and paper concerning a claim for benefits under the Servicemen's Readjustment Act of 1944 (38 U. S. C., Sections 694, *et seq.*), in that defendant did cause the Bank of America . . . to certify in a Home Loan Report presented to the United States Veterans Administration that the price paid . . . for the purchase of a residential lot . . . as to which a loan guarantee was sought from the Government of the United States . . . did not exceed the reasonable value thereof . . . as determined by proper appraisal . . . whereas, as defendant well knew and concealed from said bank

and Veterans Administration, the total price demanded and received by the defendant from said veteran . . . did exceed the reasonable value thereof as determined by a proper appraisal." [R. Vol. 1, p. 2.]

The averments of each count in the indictment are the same, except as to the name of the veteran, the description of and the price paid for the property, and the amount of the appraisal thereof.

The case was tried before a jury, and the jury returned a verdict of guilty as charged in the Second, Fourth, Fifth, Sixth, Ninth, Eleventh, Twelfth and Fourteenth Counts of the indictment. [R. Vol. 1, pp. 22-23.]

Defendant-appellant filed motions for a new trial [R. Vol. 1, pp. 23-24], for judgment of acquittal [R. Vol. 1, pp. 24-25] and for arrest of judgment. [R. Vol. 1, p. 25.] The Court granted appellant's motion for judgment of acquittal as to the Second and Fifth Counts [R. Vol. 1, p. 26, lines 24-25], and denied said motion as to the other counts upon which the jury returned a verdict of guilty, and denied the motions for arrest of judgment and for a new trial. [R. Vol. 1, pp. 26-27.]

The Court made and entered its judgment on the 25th day of February, 1949, finding and adjudging:

(1) That defendant is guilty as charged in Counts Four, Six, Nine, Eleven, Twelve and Fourteen [R. Vol. 1, p. 28, lines 1-3];

(2) That she be imprisoned for one year on each of said counts, and pay a fine of one thousand dollars

(\$1,000) for the offense stated in each such count [R. Vol. 1, p. 28, line 10, to p. 29, line 3];

(3) That she be imprisoned until said fines are paid [R. Vol. 1, p. 29, lines 2-3];

(4) That the several periods of imprisonment run concurrently [R. Vol. 1, p. 29, lines 4-7];

(5) That the sentences imposed be suspended and defendant be placed on probation for five (5) years, provided that she shall make restitution to the several veterans of the overpayments alleged to have been made by them to her, aggregating \$7,300, and that she pay a fine of \$2,700 to the United States of America at such times and in such amounts as the Probation Officer shall direct. [R. Vol. 1, pp. 29-30.]

All other counts of the indictment were by the Court ordered dismissed. [R. Vol. 1, p. 31.]

From said judgment defendant has appealed to this Court. [R. Vol. 1, pp. 32-33.]

#### Summary of Argument.

The acts charged in the Indictment do not constitute an offense against the United States of America, since they are not prohibited by the Servicemen's Readjustment Act of 1944, as amended (38 U. S. C. A., Sections 694, *et seq.*), or by any other Act of Congress.

The penal provisions of the World War Veterans' Act of 1924 (specifically, those set forth in Section 715 of Title 38 U. S. C. A.) are not incorporated into the Servicemen's Readjustment Act of 1944, as amended

(specifically into Section 697 of Title 38, U. S. C. A.), hence no penalty is provided for the acts charged in the Indictment.

The Act does not authorize the Administrator of Veterans' Affairs to promulgate any rule or regulation requiring either the seller, or the veteran, or the lender to report or certify that the price paid by the veteran for residential property does not exceed the appraised value thereof.

No act can be punished as a crime against the United States unless it is prohibited and made punishable by an Act of Congress; and the Federal Courts cannot by construction make that a crime which is not so prohibited.

A person cannot be the aider and abettor of a criminal act, or be an accessory thereto, unless the act was committed by a guilty principal.

The District Court has no jurisdiction to render a judgment of conviction for the commission of the acts charged in the Indictment, since Congress has not made such acts an offense against the United States, or provided a penalty therefor.

The District Court erred in denying defendant's motions for judgment of acquittal, for arrest of judgment, and for a new trial.

## ARGUMENT.

### I.

#### The Acts Charged in the Indictment Do Not Constitute an Offense Against the United States of America.

The offense attempted to be charged in each of Counts Four, Six, Nine, Eleven, Twelve and Fourteen of the Indictment (these being the counts upon which defendant was convicted), is that she did knowingly cause the Bank of America to make a false report to the Veterans' Administration, the alleged falsity being that the several veterans involved paid no more for the respective properties sold them than the appraised value thereof, whereas in fact they did pay sums in excess of such appraised values.

In a subsequent point of this brief, appellant will show that the Bank of America had full knowledge of the amounts paid, respectively, by the several veterans for the lots sold to them by the defendant, and that said Bank was not deceived or misled by defendant in respect to the prices so paid for said lots. Indeed, the Bank could not have been deceived in respect thereto, since the escrow papers deposited with it plainly showed the price paid by each veteran for the lot sold him, and the total price paid for both house and lot is likewise plainly shown by said escrow papers. The verdict and judgment have no support in view of this documentary evidence.

The acts charged against the defendant, even if they had been proven, do not constitute an offense against the United States for reasons now stated.

A. The Act (38 U. S. C. A., Sections 694, et seq.) Does Not Require Either the Seller, or the Veteran, or the Lender to Report to the Veterans' Administration That the Price Paid by a Veteran for Residential Property Does Not Exceed the Appraised Value Thereof.

The Act requires only one "statement" to be made concerning a loan to a veteran for the purchase of residential property. Said statement is that which is provided by Section 694(c) of Title 38, U. S. C. A., as follows:

*"Upon making a loan as provided in this subchapter, the lender shall forthwith transmit to the Administrator a statement setting forth the full name and serial number of the veteran, amount and terms of the loan, and the legal description of the property, together with the appraisal report made by the designated appraiser. Where the loan is automatically guaranteed, the Administrator shall provide the lender with a loan guaranty certificate or other evidence of guaranty."* (Italics ours.)

The statement thus required to be made must be made by the *lender*, not by the seller or by the veteran. Moreover, the Act does not require that the statement made by the lender shall state or certify that the price paid by the veteran for residential property does not exceed the appraised value thereof. The Act contains no such requirement and since that is true no such requirement may be read into it by the Government.

It is significant that Section 694(c), *supra*, requires the lender to furnish the "statement" to the Administrator *after the loan has been made and closed by the lender*. Why after, instead of before? The answer is found in Section 694(e) which provides in this behalf:

*"Any loan . . . may be guaranteed by the Administrator if he finds that it is in accord otherwise*

with the provisions of this subchapter." (Italics ours.)

The only other provisions of the Act that have any bearing upon the making of a G. I. residential loan are found in Section 694a of Title 38, U. S. C. A., and read as follows:

"Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property . . . is automatically guaranteed if made pursuant to the provisions of this subchapter, including the following . . .

"(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator." (Italics ours.)

What happens if the loan is *not* made "pursuant to the provisions" of the Act? Only this: in such event, the loan made to the veteran is not automatically guaranteed by the Veterans' Administration, and the lender must look solely to the veteran and mortgage for payment of the loan. If, nevertheless, the Administrator should issue a guarantee of a loan so made and should later discover that the loan was made pursuant to the provisions of the Act, he can revoke the guarantee for mistake or fraud practiced by the lender.

Section 694a has had little judicial construction in respect to the point under discussion. We have found only two decisions relating to the question involved, both by the Washington Supreme Court. These cases are in accord with the views here expressed, and will be cited under the next subdivision.

B. The Act Provides No Penalty Against Either the Seller, or the Veteran, or the Lender for Incorrectly Reporting to the Administrator That the Price Paid by the Veteran for Residential Property Does Not Exceed the Appraised Value Thereof.

Congress probably thought that, if the lender should incorrectly, or even falsely, report to the Administrator that the price paid by the veteran for residential property was more than the appraised value thereof, the lender would be sufficiently penalized by not having the loan guaranteed. In any event, Congress provided no specific penalty for the making of an incorrect loan statement. The Washington cases referred to, *supra*, are now submitted on the point.

In *Bryant v. Stablein*, 28 Wash. 2d 739, 184 P. 2d 45, the Washington Supreme Court said (184 P. 2d 50):

“Although the act provides, in effect, that loans thereunder are guaranteed only if made pursuant to certain provisions, one of which is that the price to be paid by the veteran shall not exceed the reasonable value thereof as determined by an appraiser, *there is no penalty fixed for paying more or receiving more than the appraised value*. In short, the act relates simply to the conditions under which the government will guarantee a loan to the veteran in the first instance, not to contracts pending or concluded between the veteran and third persons. If the price to be paid for the property is found to exceed its appraised value, the government may refuse to guarantee the loan. If it does authorize the loan and the funds are

used for the purchase of property, the seller is not concerned with the source of the purchase price. He does not stand in the position of one who, having loaned money to the veteran, thereafter looks to the government for repayment thereof. His position is that of one who has been paid the full purchase price of his property as fixed by himself. See American Law of Veterans, 277, Section 393, and footnote 14½ thereunder."

In *Ewing v. Ford*, 195 P. 2d 650, the contention was made that payment by the veteran of more than the appraised value of the property purchased was contrary to public policy; that a legal duty existed not to pay or receive more than such appraised value; and that any plan whereby more is agreed to be paid than the appraised value is against public policy and a constructive fraud. The trial court so found. But the Supreme Court rejected the contention so made, and reversed the judgment. After quoting from the *Bryant v. Stablein* case, *supra*, the Court said, at page 655 (195 P. 2d):

"In the case at bar, respondents have paid no more for the 'home property' . . . than its appraised value. But even if they had in any manner agreed to pay, and had actually paid, more than its appraised value, that transaction of itself would not have been illegal. The government might indeed have refused to guarantee a loan for a greater amount than the appraised value of the property, but, as held in the *Bryant* case, *supra*, any payment by the veteran in excess of that amount would not make the transaction of sale and purchase illegal."

These two cases plainly hold that no fraud or illegality can be imputed to a seller for receiving more for his property from a veteran than the value fixed by an appraiser designated by the Administrator.

The Act imposes no duty or obligation upon the seller of property to a veteran to make a statement or report of any kind to the Veterans' Administration as to any aspect of the sale. There is no privity between the seller and said Veterans' Administration upon which a duty to it could be based.

The Act nowhere limits the seller's right to obtain as much as he can for his property, and if such a limitation were imposed it would probably be unconstitutional. Nor does the Act limit the veteran's right to contract, except that a loan in excess of a specified amount for residential property will not be guaranteed. The veterans involved in this action were, and are, *sui juris*, hence capable of making contracts without the aid of the Veterans' Administration. They knew beyond any question the amounts, respectively, that they were paying for their lots, and likewise for the houses to be erected thereon. They were not deceived or defrauded by defendant in any respect, since they knew every fact relating to the properties purchased, and willingly entered into contracts therefor. In view of these considerations, the verdict and judgment in this case are inexplicable except, perhaps, on the ground of G. I. hysteria.

- C. The Act Does Not Authorize the Administrator of Veterans' Affairs to Promulgate Any Rule or Regulation requiring Either the Seller or the Veteran, or the Lender to Report or Certify That the Price Paid by the Veteran for Residential Property Does Not Exceed the Appraised Value Thereof. Hence the Violation of Such a Rule or Regulation Does Not Constitute an Offense Against the United States.

The indictment is entitled "Indictment (38 U. S. C. 697, 715), *and the Regulations issued thereunder*," thus indicating that the Administrator has issued a regulation, or regulations, the violation of which would presumably constitute a punishable offense against the United States. If any regulation relating to such acts as are charged in the indictment has been issued by the Administrator, it is not authorized by the Act, hence it is void, and a violation thereof would not constitute an offense against the United States. Section 694d of Title 38 U. S. C. A. contains the only provisions of the Act under which the Administrator is authorized to promulgate rules and regulations. It reads as follows:

"The Administrator is authorized to promulgate such rules and regulations, not inconsistent with this subchapter, as are necessary and appropriate for *carrying out the provisions of this subchapter*, and may delegate to subordinate employees authority to issue certificates, or other evidence, of guaranty of loans guaranteed under the provisions of this subchapter, and to exercise other administrative functions under this subchapter." (Italics ours.)

It is obvious from its terms that Section 694d, *supra*, only authorizes the Administrator to promulgate rules or regulations of a purely administrative nature, and that he is not authorized thereby to promulgate rules or regulations the violation of which would constitute a crime. That, we may add, is the function of Congress.

It is well settled that no act can be punished as a crime against the United States unless it is prohibited and made punishable by an Act of Congress; and the federal courts cannot by construction make that a crime which is not so prohibited.

*Langetta v. New Jersey*, 306 U. S. 451;  
*United States v. Resnick*, 299 U. S. 207;  
*Donnelly v. United States*, 276 U. S. 505;  
*Fasulo v. United States*, 272 U. S. 620;  
*United States v. Arnold*, 115 F. 2d 523;  
22 C. J. S. 66, 67, Sec. 17 of "Criminal Law."

As was said in *Fasulo v. United States*, 272 U. S. 620, *supra*, at page 629:

"There are no constructive offenses; and, before one can be punished, it must be shown that his case is plainly within the statute. (Citing cases.)"

In *Arnold v. United States*, 115 F. 2d 523 (8 Cir.), *supra*, the Court said, at page 526:

"As this is a criminal statute it must be construed strictly, and it cannot be enlarged by implication or intendment beyond the fair meaning of the language used. It should not, of course, be construed so as

to defeat the obvious intention of Congress. A statutory offense cannot be established by implication and there can be no constructive offense. Before an accused can be punished, his act must be plainly within the statute (citing many federal cases)."

The acts charged in the indictment—that is, the alleged acts of causing the lender to make false reports to the Administrator that the prices paid for lots did not exceed the appraised values thereof—are not mentioned in, or prohibited by, the Act of 1944 and, of course, are not mentioned or referred to in the Act of 1924.

Moreover, the Act of 1944 does not prohibit the seller of residential property to a veteran from obtaining the highest price possible for such property, nor does it limit the seller's price therefor to an amount fixed by the appraisers. The Act provides in this connection only that the lender shall furnish to the Administrator "a statement setting forth the full name and serial number of the veteran, amount and terms of loan, and the legal description of the property, together with the appraisal report made by the designated appraiser." (Section 694(c) of Title 38 U. S. C. A.) The Government has manifestly read into the Act something that is not "plainly within the statute" (*Fasulo v. United States, supra*), thus violating a cardinal rule in the construction of a federal criminal statute. Specifically, the Government has read into the Act (1) an offense consisting of the making or causing to be made of a false report; (2) the prohibition thereof, and (3) a penalty therefor. The Act contains none of these elements essential to constitute a punishable offense against the United States.

The comment of the United States Supreme Court, in *Panama Refining Company v. Ryan*, 293 U. S. 388, is pertinent. The Court said at pages 432, 433 (*id.*):

“If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board or commission, and, if that authority depends on determinations of fact, those determinations must be shown . . . We cannot regard (even) the President as immune from the application of these constitutional premises.”

- D. The Penal Provisions of the World War Veterans' Act of 1924 Are Not Incorporated into the Servicemen's Readjustment Act of 1944; but If It Be Assumed That Said Penal Provisions Are Validly Incorporated into the Servicemen's Readjustment Act of 1944, Such Provisions Do Not Apply to the Acts Charged in the Indictment, Hence the Commission of Such Acts Does Not Constitute an Offense Against the United States.

The penal provisions of the World War Veterans' Act of 1924 are codified in Sections 712, 713, 714 and 715 of Title 38 U. S. C. A. Section 712 provides that

“whoever in any claim for benefits . . . (that is, for pensions, medical, hospital and retired officers' pay benefits) makes any sworn statement knowing it to be false, shall be guilty of perjury . . .”

Section 713 creates a punishable offense for accepting payment of a pension when the right thereto has ceased. Section 714 creates a punishable offense for receiving a pension when the recipient is not entitled thereto. Clearly, Sections 712, 713 and 714 are not applicable to the acts charged in the indictment in the case at bar.

Section 715 of Title 38 U. S. C. A. reads as follows:

“Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both . . .”

It thus appears that the penal provisions of Section 715 apply specifically and only to the acts of a person who is guilty of making, or causing to be made, a false statement in an application for a pension (Section 701 of Title 38 U. S. C. A.), or for domiciliary care or hospital treatment (Section 706), or for emergency officers' retired disability pay (Section 710), or for receiving a pension the right to which has ceased (Section 713), or for receiving a pension without being entitled thereto. (Section 714.) The penal provisions of Section 715 are clearly limited to a veteran or some member of his family who is guilty of making a false statement for any of the purposes above mentioned, or who causes another person to make a false statement for the benefit of the veteran in respect to such purposes. Sections 30a and 485 of Title 5 U. S. C. A. refer only to civilian employees of the Government and are not pertinent to the discussion.

If the penal provisions of Section 715 (World War Veterans' Act of 1924) have become a part of the Servicemen's Readjustment Act of 1944, it is by reason of the provisions of the latter Act as codified in Section 697 of Title 38 U. S. C. A., which reads as follows:

"Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 30a and 485 of Title 5 and Sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 721 of this title, and the provisions of Sections 450, 451, 454a and 556a of this title, *shall be for application under this chapter.*" (Italics ours.)

Sections 450, 451, 454a and 556a are not pertinent here.

It is manifest that the phrase "shall be for application under this chapter" is vague and uncertain. It does not plainly show, or even show at all, that Congress intended that the act of causing a lender to make a false or incorrect report to the administrator concerning the price paid for residential property by a veteran—a report, by the way, not required by the act to be made—should constitute a punishable offense against the United States. Therefore, it does not meet the oft-repeated judicial requirement that "before an accused can be punished, his act must *plainly* be within the statute." (*Arnold v. United States, supra.*)

But, if it be assumed that the penal provisions of Section 715 are sufficiently incorporated into Section 697 by the phrase "shall be for application under this chapter," do such penal provisions apply to the acts charged in the indictment against appellant? We believe that, when properly analyzed, the penal provisions of Section 715 cannot be legally applied to such acts.

The wording of Section 715 clearly shows, in our view, that the penalties therein provided apply only to veterans or others entitled to benefits under the Act of 1924. There are two reasons for this view of said Section 715.

First, Section 701 of Title 38 U. S. C. A. specifically refers to "any person who served" in military or naval service, or to the "widow, child, or children, dependent mother or father" of such person. Section 706 refers to domiciliary care and hospital treatment of a veteran. Section 712 refers to "whoever in any claim for benefits" under the Act of 1924 makes any sworn statement known to be false, and makes such swearing perjury. Sections 713 and 714 refers to "any person" who shall accept payment of or receive a pension when the right thereto has ceased, or when he is not entitled thereto. These sections refer to a veteran, or other person, entitled to the benefits provided in the Act of 1924, and not to third persons.

Second, by its express terms Section 715 is applicable only to the veteran, or, if deceased, to members of his family. The Section provides:

"Any person who shall knowingly make or cause to be made . . . a false or fraudulent . . . certificate (or) statement . . . concerning any claim for benefits under (specified sections of the Act of 1924) . . . shall forfeit all rights, claims, and benefits under said sections, and, *in addition* to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished . . ." (Italics ours.)

It is manifest that only the veteran, or some member of his family, entitled to a pension or to other benefits provided in the Act of 1924 could "forfeit his rights and claims" thereto. It is also clear that only the veteran, or

some member of his family, entitled to such benefits and who has thus forfeited them could be included in the phrase "and, *in addition* (to the loss of one's benefits) . . . shall be guilty of a misdemeanor," etc. In other words, as was urged by appellant's counsel at the trial,

"you can't add onto something that you do not have. You could not add that additional penalty on if you did not have some right to forfeit." [R. p. 394, lines 23-25.]

So, if Section 715 can be read into Section 697, we have penalties applying only to a veteran, or to some member of his family, for making or causing to be made a false claim, statement, etc., for a pension or other benefit specified in the Act of 1924. How, then, could those penalties be extended and applied to a person who is not a veteran, or who is not related to a veteran, and who is not entitled to any benefit provided by that Act, or by the Act of 1944?

If Congress had so intended, it would have been a simple matter to provide that:

Whoever shall make or cause to be made a false statement to the administrator for the purpose of securing the guaranty of a loan made to a veteran upon residential property, shall be guilty of a misdemeanor, and shall be punished accordingly.

Or, Congress could have easily provided, if it so intended, that

Whoever shall make or cause to be made a statement, knowing the same to be false, that the price paid by a veteran for residential property does not exceed the appraised value thereof, shall be guilty of a misdemeanor, etc.

Even the Government conceded at the trial that the language of Section 694 is unusual and dubious in meaning.

In the colloquy between the District Judge and counsel in respect thereto, Mr. Fitting said:

"I have never seen it before and no dictionary that I have consulted gives any clue to what it would mean other than what you get just from a reading,"

and we submit that "what you get" is doubt and uncertainty as to what it means, if indeed it has any legal meaning at all. In any event, the section does not meet the requirement that "before an accused can be punished, his act must plainly be within the statute."

## II.

### The District Court Has No Jurisdiction to Try and Enter Judgment Against Appellants for an Offense Not Clearly Provided by Law.

It is well settled that the criminal jurisdiction of the federal courts is only such as is expressly conferred on them by statute; and such courts can take cognizance of and punish only such crimes and offenses as they are given jurisdiction of by the laws of Congress.

35 Corpus Juris Secundum 780, Section 4c of Criminal Law, and cases cited;  
18 U. S. C. A., Section 3231.

See, also, cases cited under Point I B, *ante*.

It is not necessary to repeat the argument that the penal provisions of the World War Veterans' Act of 1924 are not incorporated into the Servicemen's Readjustment Act of 1944, or that if they are incorporated therein they do not apply to the acts charged in the indictment. It is sufficient to say that the commission of the acts charged is not made an offense by any law of the United States, hence the District Court is without jurisdiction to take cognizance of the alleged acts or to punish appellant therefor.

III.

The Indictment Shows on Its Face That if an Offense Against the United States Has Been Committed, the Bank of America Is the Principal, but Since the Bank Is Not Charged With Any Offense, Although It Made the False Certificates, the Appellant Cannot Be Convicted and Punished as an Aider and Abettor of Such Offense.

Each count of the indictment charges that appellant “did knowingly cause to be made (by the Bank of America) a false certificate (concerning the price paid for a lot by a veteran) . . . in that defendants did cause the Bank . . . to certify . . . that the price paid . . . did not exceed the reasonable value thereof . . . as determined by proper appraisal . . . whereas, as defendant well know and caused to be concealed from said bank and Veterans Administration, the total price demanded and received by the defendant . . . did exceed”

such appraisal. (Italics ours.)

Thus, legally, the indictment charges appellant with having aided and abetted the Bank in the commission of a criminal offense. In the same breath it charges, in effect, that the Bank is innocent, because the price of each lot sold to a veteran was concealed from the Bank.

It is well settled that a person cannot be convicted and punished as the aider or abettor of a criminal act, or as an accessory thereto, unless the act was committed by a *guilty* principal.

*Coffin v. United States*, 162 U. S. 664, 669;

*Havener v. United States*, 15 F. 2d 503, 505;

*Ito v. United States* (9 Cir.), 64 F. 2d 73, 75;

*United States v. Peoni*, 100 F. 2d 401;  
*United States v. Dellaro*, 99 F. 2d 781;  
*Nigro v. United States*, 117 F. 2d 624, 630;  
*Morei v. United States*, 127 F. 2d 831;  
*Morgan v. United States*, 159 F. 2d 85, 87.

There must be criminal concert of the aider and abettor with the principal (*id.*).

Appellant is charged with a crime consisting mainly, if not entirely, of her alleged failure to disclose to the Bank the actual purchase price paid by each veteran for the lot sold him, but the law imposes no duty upon the seller to inform the lender, or the Veterans' Administration, of the price paid for property by a veteran.

In the absence of any duty enjoined by law, appellant cannot be punished for mere acquiescence or inaction or failure to report the true price paid by each veteran for his lot.

22 Corpus Juris Secundum, p. 158, Section 88 of Criminal Law;

*United States v. Dellaro*, 99 F. 2d 781;

*People v. Weber*, 84 Cal. App. 2d 126.

The rule is succinctly stated in *United States v. Dellaro*, 99 F. 2d 781, at page 783, as follows:

“. . . But we cannot agree that mere inaction makes the lessor a party to the lessee's crime, either as an accessory or as conspirator, though of course it may help to prove that the lease is a mere cover, and that he is in fact a partner. Inaction is of course acquiescence, but acquiescence is passive, and to become a party to a crime one must affirmatively

unite oneself with the venture, or, in case of a conspiracy, must agree to take some part in it."

In *People v. Weber*, 84 Cal. App. 2d 126, the Court said:

"It is well settled that aiding and abetting the commission of a crime requires some affirmative action. The mere knowledge or belief that a crime is being committed, and the failure on the part of the one having such knowledge or belief to take some steps to prevent it, in no sense amounts to aiding and abetting."

Concealment, consisting in the case at bar of appellant's alleged failure to disclose to the Bank the price of a lot sold to a veteran, is not affirmative action. It is inaction, or asquiescence, hence under the authorities above cited cannot amount to aiding or abetting. Active inducement must exist; mere concealment is insufficient. Nor does such concealment make appellant a principal under Section 2 of the Criminal Code (18 U. S. C. A. Section 2). The Code defines a principal to be:

"(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such."

The definitions, *supra*, contemplate more than inaction, or concealment; they clearly require positive, affirmative acts, or words which induce action by another. The words "whoever . . . aids, abets, counsels, commands, or

procures" certainly extend far beyond concealment or inaction which are passive. In the sense used in the statute, the word "causes" likewise implies more than inaction or concealment.

The acts charged in the indictment really mean and amount to *procuring* the Bank to make a false statement to the Administrator. "Procuring" is not only different from mere concealment, but is wholly inconsistent therewith.

#### IV.

#### **The Evidence Is Insufficient to Sustain the Allegations of the Indictment, or to Support the Verdict and Judgment.**

At the conclusion of the Government's evidence in chief appellant's counsel moved the Court for a judgment of acquittal on two grounds, to wit: (1) Because the evidence is insufficient to sustain the allegations of the indictment; and (2) because the indictment does not state an offense against the United States. [R. p. 388, lines 12-22.] After extensive argument, the motions were denied, with privilege to renew them at the conclusion of all the evidence. [R. p. 431, lines 17-19.] The motions were renewed, and again presented to the Court at the conclusion of all of the evidence [R. pp. 507-508], and were again denied by the Court. [R. p. 519, lines 13-14.]

In the argument on the motions for judgment of acquittal, appellant's counsel presented the same points of law which appear in this brief, and especially emphasized the point that appellant did not conceal from the Bank the true prices paid to her for the lots sold to the veterans, hence that she did not cause the Bank to make false

reports in respect to such prices to the Veterans' Administration.

The evidence adduced by the Government shows that there was a double escrow in fifteen of the seventeen sales which are set forth in the seventeen counts of the indictment; and that double escrows were involved in five of the six counts upon which appellant was convicted. It was argued to the trial court, and is earnestly urged here, that each of these double escrows contains documentary facts that plainly show that the Bank had, or is charged with, knowledge when it submitted its certificates or statements to the Administrator that the prices paid for the lots in question were not in excess of the appraised values thereof. Since the Bank had, or is charged with, such knowledge, it necessarily follows that appellant did not conceal from the Bank the true prices paid for the several lots, hence it was not deceived in respect thereto and was not, and could not have been, induced by appellant to make false reports as to such prices to the Administrator. To argue otherwise would be to assume that the Bank is either a fool, or a knave, or both.

Furthermore, the record affirmatively shows that appellant did not have any knowledge as to the appraised values of the lots in question at the times she made the sales thereof to veterans, or at any other time. [R. p. 66, lines 1-2.] Indeed, she could not have had any such knowledge, since the appraisals were made *after* she had entered into the sales agreements and *after* the escrow papers had been deposited with the Bank.

Two of the Bank's officers testified for the Government: Maurice Williams [R. p. 267, *et seq.*], Assistant Manager

of the Santa Monica Branch of said Bank; and Ernest E. Shacklett [R. p. 321, *et seq.*], Escrow Officer of the Pico-La Cienega Branch of said Bank. Their evidence alone is sufficient to charge the Bank with actual knowledge that the true prices paid for the lots involved in the double escrows were in excess of the appraised values thereof.

Mr. Williams testified [R. p. 311] that in arriving at the cost of a lot "we depend upon the escrow instructions" [R. p. 311, line 23] "and the application" of the veteran for a loan. [R. p. 311, line 25.] He later testified that the Bank's work sheets—more or less a summary, of the entire escrow in each sale—discloses that sums were paid by veterans on lots, outside of escrow, to appellant.

For example, Mr. Shacklett testified that work sheet [Gov't Exhibit 20-A], sale to Hyman, shows that the sum of \$450.00 was paid outside of escrow by the veteran to appellant. [R. p. 336, lines 23-25, and p. 337, lines 1-5.] This exhibit also contains the words "I will hand you (the Bank) the sum of \$1,550.00, \$450.00 having been paid outside of escrow." [R. p. 337, lines 8-9.] A similar showing is made in the sale embodied in work sheet [Gov't Exhibit 21-B], which shows that the sum of \$250.00 was paid outside of escrow to appellant. [R. p. 343, lines 5-22.] The escrow papers deposited with the Bank in the lot sale to Donald S. Regester [Gov't Exhibits 30-A and 31-A] recites, "I will hand you the sum of \$1,550.00, \$600.00 having been paid outside of escrow. Total consideration \$2,150.00."

Government counsel elicited from appellant, on cross-examination, the following [R. p. 500, lines 23-25 and p. 501, lines 1-12] :

“Q. Well, what I am driving at is this, Miss Karrill: Where you employed the double escrow, *the first escrow instruction always stated the precise and exact and true amount which was paid for the lot*; you remember that? A. Yes.

Q. Now, was it of any interest to you that the actual amount paid appeared on that instruction? A. Because that was the amount I was getting for the lot.

Q. Now, if that is true, that interest, did it carry over when you used only one instruction? A. Well, I had given the veteran a receipt or one of my brokers had given them a receipt (for the outside of escrow payment) in every instance, and they had always been assured that in the event the loan did not go through, they would get their money back.” (Italics ours.)

The Government thus shows that in all double escrows “the first instruction (to the Bank) always stated the precise and exact and true amount which was paid for the lot.”

If appellant intended, as charged in the indictment, to conceal the true price of the lot from the Bank, then, perhaps, the Government will try to explain to the Court why appellant would show, in the escrow paper that she was directly interested in, “the precise and exact and true price” paid to her for such lot. In view of the testimony above referred to, it is absurd to say that appellant concealed, or tried to conceal from the Bank the true price paid for any of the lots involved. It is equally absurd to

say that the Bank was deceived by appellant, or that it did not have actual knowledge of the true prices paid at the time, or times, it made the alleged false certificates to the Administrator. Nor is this all.

In the long argument and colloquy between the Court and counsel on the motion for judgment of acquittal, the following, considered alone and apart from the evidence, is sufficient to establish the correctness of our contention that the Bank had knowledge, at the time it made the alleged false certificates or statements to the Administrator, of the precise and exact and true amount which was paid (to appellant) for each lot involved in this action.

The following colloquy occurred [R. p. 418, lines 4-25]:

*"The Court:* Did the Bank commit an offense? Has not the Bank made a false statement here?

*Mr. Fitting:* Well, under the interpretation of the facts we have been discussing, it appears that perhaps they did.

*The Court:* Did the Bank commit a criminal offense?

*Mr. Fitting:* Perhaps we could charge them with that. However, they are not charged with it here.

*The Court:* Is the lending institution liable for making a false statement?

*Mr. Fitting:* I do not see why they should not be. Under the statute it would apply to anyone who makes or causes to be made a false certificate, and if the lending institution makes a false certificate knowingly, it seems to me that they, too, could be held.

*The Court:* Is there any question in your mind in respect to these double escrows but what they (the certificates) were knowingly made?

*Mr. Fitting:* There isn't any more.

*The Court:* So you say that the Bank committed an offense and that this defendant aided and abetted, is that it?

*Mr. Fitting:* Yes; and also caused." (Italics ours.)

It appears from this colloquy that both the Court and Government counsel agreed that the double escrows deposited in the Bank gave the Bank actual or imputed knowledge as to the true prices paid by the several veterans for the lots in question. The double escrows permit no other conclusion. Government counsel, however, insisted that appellant caused the Bank to make certificates known by it to be false. [R. p. 418, line 25.] Just how appellant, a lone woman without financial standing or influence, could cause the largest Bank in the United States to make a false report and thereby commit a crime is not explained by Government counsel or by the trial court. It is utterly fantastic to assume that the Bank could be influenced by appellant to do such a thing. It is perfectly reasonable, and consistent with the large volume of business transacted by the Bank, to conclude that, although the escrow papers fully disclosed the actual prices paid for the lots, the Bank inadvertently and carelessly overlooked that fact.

In the colloquy between Court and Government counsel, the following is also pertinent [R. p. 413]:

"*The Court:* Can you cause somebody to make a false statement if he is making it for his own account and he knows the true facts?

*Mr. Fitting:* I think . . . we certainly can  
. . .

*The Court:* Yes; you cause a person in the sense that he is acting, if you cause him to act or procure him or induce him to act; but the Bank was acting for the Bank, was it not?

*Mr. Fitting:* They were acting for the Bank, but also—

*The Court:* The Bank did not make a certificate on behalf of the defendant, did it?

*Mr. Fitting:* No.

*The Court:* It did not make the certificate as agent of the defendant, did it?

*Mr. Fitting:* No.

*The Court:* The defendant did not induce the Bank to make the statement, did it?

*Mr. Fitting:* For her transaction to go through for these veterans to get the loans it was necessary that the statement be made (by the Bank to the Administrator). She rigged the transaction so that it would appear that they fall within the law.

*The Court:* Appear to whom?

*Mr. Fitting:* So that the paper would come to the certifying branch, the Santa Monica Branch—

*The Court:* But, Mr. Fitting, you have to start with the assumption that the Bank is one entity and that everything an agent knows the Bank knows . . . So what the manager of the Pico-La Cienega Branch of the Bank of America knew, the Bank knew, did it not; and what the manager of the Santa Monica Branch knew, the Bank knew, did it not?

*Mr. Fitting:* Yes.

*The Court:* Now, you can argue practicalities, you can argue as a practical matter it may not have known, but, as a matter of law, the law charges the bank with knowledge, doesn't it?

*Mr. Fitting: That is right."* [R. pp. 413-414.]  
(Italics ours.)

The above colloquy resulted from the Government's contention that the Pico-La Cienega Branch of the Bank (where the escrows were originally made and deposited) did not transmit *all* of the papers to the Santa Monica Branch of said Bank (which made the certificates to the Administrator), and, hence, the Government argued, the Bank was not charged with knowledge in the possession of its Pico-La Cienega Branch. No argument, or citation of authority, is necessary to show the fallacy of the Government's contention. The trial Court very properly said, in respect to this contention [R. p. 409, lines 15-16]:

“The right hand has to know what the left hand is doing”

and

“The law requires that every man knows what both his hands are doing.” [R. p. 409, lines 20-21.]

The colloquies above set forth epitomize the evidence, and the statements and admissions of Government counsel in respect to the Bank's actual, or implied, knowledge of the true prices paid for the lots in question. They show beyond question that the Bank had, or was charged with, knowledge of the true prices paid for said lots. This being true, how could appellant have deceived the Bank? How could there be concealment by her of a fact plainly shown by documents deposited in the Bank?

The entire case against appellant must, and does, rest upon the alleged concealment by appellant of the true prices paid for the lots sold to veterans. The case fails when the evidence shows, and Government counsel grudgingly

ingly admit, and the trial Court says, that the escrow papers deposited in the Bank disclose the actual and true prices paid to appellant by the veterans.

Aside from the alleged concealment and deception, there is no evidence that shows, or remotely tends to show, that appellant caused, procured, persuaded or induced the Bank to make false reports or certificates to the Administrator. Moreover, as already stated, it is utterly fantastic to assume that appellant could have caused the largest private lending institution in the United States to make false statements constituting punishable offenses against the United States.

It is also important to note in this connection certain other facts.

Appellant's purchase of the tract containing the lots sold to the veterans involved here was escrowed with the Bank of America. [R. p. 457, lines 11-16.] Appellant followed the form or pattern of escrow made up, in her original sale, by employees or officers of said Bank. [R. p. 455, lines 16-25, and p. 456, lines 1-24.]

The Government failed to produce or to offer in evidence any of the loan applications made by these veterans to the Bank. It made no effort to elicit any knowledge by the Bank of prices paid for the lots independent of the escrow, all of which it placed in evidence. It made no attempt to show, independently of the escrow papers, any effort by appellant to deceive the Bank.

Since the double escrow papers plainly show the true prices paid for lots by the veterans, and there is no evidence to the contrary, we submit that not only is the evidence insufficient to sustain the allegations of the indict-

ment or to support the verdict and judgment rendered, but that, on the contrary, the evidence rebuts and overcomes said allegations. There is, therefore, no evidence to sustain the allegations of the indictment or to support the verdict and judgment, and the same should be reversed.

V.

**The District Court Erred in Holding, as a Condition of Probation, That Appellant Make Restitution to Twelve Supposed Veterans of Sums Aggregating \$4,200.00 as and for Loss and Damage Caused by Offenses Charged in the Indictment for Which No Convictions Were Had.**

The Court adjudged that execution of the sentence imposed under counts 4, 6, 9, 11, 12 and 14 be suspended and that applicant be placed on probation for five years, upon the condition that

“. . . during the probationary period the defendant shall (1) make full restitution of \$7,300.00, such restitution to be made at such times and in such installments as the Probation Officer of this Court shall direct, the proceeds of such restitution to be applied to reduce the loans of the veterans involved, as follows:

Name of Veteran	Amount of Restitution"
[R. Vol. 1, pp. 529-30.]	

Under the title “Name of Veteran” are specified the names of eighteen persons, presumably veterans, and under the title “Amount of Restitution” the amount to be paid as restitution to, or for the account of, each of said veterans is set forth opposite his name.

The Court thus ordered so-called restitution to be made to twelve supposed veterans because of offenses charged in the indictment, notwithstanding the fact that no convictions were had for said alleged offenses. The aggregate amount thus erroneously ordered to be paid is \$4,200.00.

The District Court is without power to require restitution of loss or damages caused by an alleged offense for which no conviction was had. This plainly appears from the provisions of Section 3651 of the new Criminal Code (18 U. S. C. A., Sec. 3651). Among other things, that section provides:

“While on probation and among the conditions thereof, the defendant—

\* \* \* \* \*

May be required to make restitution or reparation to aggrieved parties for *actual damages or loss caused by the offense for which conviction was had . . .*”  
(Italics ours.)

No convictions were had upon eleven counts of the indictment. It follows, of course, that the Court is without power to require restitution of supposed damages or loss, even if the same had been proven, which is denied, caused by the offenses charged in the eleven counts mentioned for which appellant was not convicted.

Furthermore, there is no evidence in the record that shows that any of the six veterans named in the counts upon which appellant was convicted, suffered any actual damages or loss. In the absence of such a showing, the Court erred in ordering restitution even to said six veterans.

Moreover, appellant was ordered to make restitution to one person, presumably a veteran, who is not even mentioned in any of the seventeen counts of the indictment. Including the amount ordered to be paid to this person [Irving J. Stein, \$250.00, R. Vol. 1, p. 30, line 12] the Court has erroneously ordered appellant to pay the aggregate sum of \$4,200.00 in respect to offenses for which no convictions were had. The judgment is, therefore, erroneous and should be reversed for this, as well as for other reasons, *ante*.

## VI.

**The District Court Erred: (a) In Denying Appellant's Motion for a Judgment of Acquittal; (b) In Overruling Appellant's Motion for Arrest of Judgment; and (c) In Overruling Appellant's Motion for a New Trial.**

As already stated, *ante*, appellant filed motions for judgment of acquittal, the first at the conclusion of the Government's evidence in chief, and the second at the conclusion of all the evidence in the case. The grounds of these two motions were: (1) That the indictment does not state a public offense against the United States; and (2) that the evidence is legally insufficient to sustain the allegations of the indictment. [R. Vol. 1, p. 27.]

Thereafter appellant filed motion for arrest of judgment upon the same grounds set forth in her motion for a judgment of acquittal. [R. Vol. 1, p. 29.]

Thereafter appellant filed motion for a new trial upon the grounds: (1) That the Court erred in denying her

motion for judgment of acquittal; (2) that the verdict is contrary to the weight of the evidence; and (3) that the verdict is not supported by substantial evidence. [R. Vol. 1, p. 24.] Two other grounds were included, but are not relied on here.

It is unnecessary to argue Point VI, *supra*, in detail, since the sufficiency of the evidence to sustain the allegations of the indictment, or to support the verdict and judgment, has been fully presented under Point IV, *ante*.

The three motions above indicated were made and presented at the times required, and in due course. These motions should have been granted, and we submit that the Court erred in denying them.

### Conclusion.

The following propositions have been established, from the record, in this brief:

(1) The acts charged in the indictment do not constitute an offense against the United States, for which appellant can be punished.

(2) The District Court is without jurisdiction to try and enter judgment against appellant because of the acts alleged in the indictment, since the commission of said acts is not made an offense against the United States by any Act of Congress.

(3) If an offense has been committed against the United States, the Bank of America is the guilty principal, and appellant cannot be convicted for aiding and

abetting the Bank until and unless it is first convicted as such principal.

(4) The evidence does not sustain the allegations of the indictment, or support the verdict and judgment.

(5) The District Court is without power to require, and erred in requiring, appellant to make restitution of alleged loss and damage resulting from alleged offenses for which she was not convicted.

(6) The Court erred in denying appellant's motions for judgment of acquittal, for arrest of judgment, and for a new trial.

Wherefore, appellant prays that the judgment of the District Court be reversed.

Respectfully submitted,

JOHN W. PRESTON.

*Attorney for Appellant.*

No. 12199

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

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SEP 1 1949

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Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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No. 12199

IN THE

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

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BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

**APPELLEE'S BRIEF.**

---

**Jurisdictional Statement.**

Appellant was indicted under Sections 697 and 715 of Title 38 of the United States Code on October 27, 1948 [R<sup>1</sup> 19]. The District Court had jurisdiction of the cause under Section 3231 of Title 18 of the United States Code. The offenses charged were committed in Los Angeles County, within the Central Division of the Southern District of California.<sup>2</sup> Judgment was entered on February 25, 1949 [R 27-31]. Notice of Appeal was filed on February 28, 1949 [R 32-33]. This Court has jurisdiction under Section 1291 of Title 28 of the United States Code.

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<sup>1</sup>References preceded by the letter "R" are to the typewritten "Transcript of Record" [Volume 1 of the Typed Record on Appeal]; those by the letter "T" are to the typewritten "Reporter's Transcript of Proceedings" [Volumes 2, 3 and 4 of the Typed Record on Appeal]; and those by "AB" to Appellant's Opening Brief.

<sup>2</sup>The Indictment so charged [R 2-19]. The evidence supported it. No attack is made on the grounds of lack of venue.

### Statement of the Case.

On October 27, 1948, the Federal Grand Jury at Los Angeles returned an Indictment against appellant in seventeen counts, which was filed that day in the United States District Court for the Southern District of California, Central Division [R 2-19]. Each count of the Indictment charged appellant with knowingly causing to be made a false certificate concerning a claim for benefits under the Servicemen's Readjustment Act of 1944, in that she caused the Bank of America to certify in a Home Loan Report presented to the Veterans Administration that the price paid by a veteran for a lot was a specified figure and did not exceed the reasonable value thereof as determined by a proper appraisal, whereas, as appellant well knew and concealed from the bank and the Veterans Administration, the total price demanded and received by appellant was a higher figure than that stated in the report and also higher than the appraised reasonable value. Each of the seventeen counts involved a different veteran.

On November 1, 1948, appellant pleaded not guilty to all counts [R 19-20]. Trial was commenced before a jury on January 11, 1949 [R 20-21]. The Government dismissed 8 counts (1, 3, 8, 10, 13, 15, 16 and 17), and trial was had on the remaining 9 counts [R 21]. In the course of the trial, the Government dismissed one further count [Count 7, R 22]. The jury found appellant guilty on January 19, 1949, as to all 8 of the counts submitted to it [Counts 2, 4, 5, 6, 9, 11, 12 and 14, R 22-23]. Appellant's motion for a new trial [R 23-24] and for arrest of judgment [R 25] were denied [R 26-27]. Appellant's motion for judgment of acquittal was granted as to Counts 2 and 5, but denied as to all other counts [R 26].

On February 25, 1949, appellant was sentenced to imprisonment for one year and fined \$1000 on each of Counts

4, 6, 9, 11, 12 and 14, and execution of such sentences was suspended and appellant placed on probation for five years, the conditions of which were: (1) that she make restitution to eighteen named veterans in the total sum of \$7300; (2) that she pay a fine of \$2700; and (3) that she obey all laws and comply with the rules of the Probation Office [R 27-32]. Notice of Appeal was filed on February 28, 1949 [R 32-33].

### Statutes and Regulations Involved.

#### (a) PENAL STATUTES.

Section 1500(a) of the Servicemen's Readjustment Act of 1944—popularly known as the G. I. Bill of Rights—provides (38 U. S. C. 697(a)):

“Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and the provisions of sections 450, 451, 454a and 556a of this title, shall be for application under this chapter.<sup>1</sup> For the purpose of carrying out any of the provisions of sections 30a and 485 of Title 5 and sections 701-703, 704, 705, 706, 707-710, 712-715, 717, 718, 720, and 721 of this title, and this chapter, the Administrator shall have authority to accept uncompensated services, and to enter into contracts or agreements with private or public agencies, or persons, for necessary services, including personal services, as he may deem practicable.”

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<sup>1</sup>The exact language of this sentence as enacted was (58 Stat. 300):

“Except as otherwise provided in this Act, the administrative, definitive, and penal provisions under Public, Numbered 2, Seventy-third Congress, as amended, and the provisions of Public, Numbered 262, Seventy-fourth Congress, as amended (38 U. S. C. 450, 451, 454a and 556a), shall be for application under this Act.”

Section 715 of Title 38 provides:<sup>2</sup>

“Any person who shall knowingly make or cause to be made, or conspire, combine, aid, or assist in, agree to, arrange for, or in any wise procure the making or presentation of a false or fraudulent affidavit, declaration, certificate, statement, voucher, or paper, or writing purporting to be such, concerning any claim for benefits under sections 701-703, 704, 705, 706, 707-715, 716-721 of this title, and sections 30a, 485 of Title 5, shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1,000 or imprisonment for not more than one year, or both.”

(b) OTHER STATUTORY PROVISIONS.

The provisions of the Servicemen's Readjustment Act of 1944 relating to loans to veterans for the purchase of real estate are in Title III of the Act (38 U. S. C. 694, 694a-k; 58 Stat. 291-293, as amended by 59 Stat. 626-631). Under that Title, the United States, through the Administrator of Veterans Affairs, will guarantee, within certain limits, loans made to veterans of World War II for purchasing or constructing dwellings to be occupied as their homes. As to the requirements the loan must meet, Section 501 provides, in part (38 U. S. C. 694a):

“Any loan made to a veteran under this subchapter, the proceeds of which are to be used for purchasing residential property or constructing a dwelling to be occupied as his home or for the purpose of making repairs, alterations, or improvements in property owned by him and occupied as his home, is auto-

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<sup>2</sup>Enacted as Sec. 15 of Public Numbered 2, Seventy-third Congress (48 Stat. 8, 11).

matically guaranteed if made pursuant to the provisions of this subchapter, including the following:

“(3) That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, or alterations does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator.”

Section 504 (38 U. S. C. 694d) gives the Administrator the power to promulgate necessary and appropriate rules and regulations for carrying out the provisions of the statute.

(c) REGULATIONS.

Regulations under the Servicemen's Readjustment Act of 1944 were promulgated by the Administrator (11 F. R. 2118-2126). Section 36:4336 of such regulations provides (11 F. R. 2124):

“No loan is guaranteeable or insurable the proceeds of which have been expended or will be expended for property, or for construction, alterations, repairs or improvements, the purchase price or cost of which is in excess of the reasonable value of the same as determined by a proper appraisal made by an appraiser designated by the Administrator.”

And Section 36:4303(c) provides, in part (11 F. R. 2120):

“Evidence of automatic guaranty or of insurance will be issuable if the loan is reported to the Administrator within 30 days following full disbursement, and upon the certification of the lender that:

“(i) The loan has been made in full accordance with the terms and provisions of the act.”

### Facts.

During 1946, appellant, operating under the name of Personality Homes, purchased lots in Tract 9733 in Los Angeles for resale [T 454-5, 457]. After appraisers had checked and found the lots suitable for veterans' homes [T 458, 497], appellant began in May, 1946, selling the lots to veterans [T 459], selling between 45 and 50 lots in all [T 496]. With the lots, appellant also signed the veterans up to contracts to have houses built on the lots by Culver City Housing Corporation [T 470], each house and lot being a package deal [T 487]. Each of the 45 or 50 transactions was handled the same as the transactions in the indictment [T 505-6].

The transactions in the six counts involved in the appeal fall into two basic patterns, the double escrow transactions (Counts 4, 6, 11, 12 and 14) and the single escrow transactions (Count 9). Typical of the double escrows was the Wilder transaction (Count 6). Wilder selected at appellant's office a house to be built for \$8450, and a lot for \$2450, a total of \$10,900 [T 198-9]. Appellant told him the G. I. loan could only total \$10,000 and would hence cover only \$1550 of the \$2450 for the lot [T 198], and that he must pay the \$900 extra to appellant in cash from his own funds, which he did [T 199, 200, 202, 204, 207]. Appellant herself testified [T 477-8]:

"Well, we told Mr. Wilder that it would be necessary for him to have two escrows, one showing the balance to be paid by the loan and the other to show the exact amount of the lot, the cost of the lot. And I asked him if he had a friend or relative that the first escrow could be made to; and he said he didn't, and the salesman was present at that time, and I don't remember whether I asked Mr. DeSpain or whether

Mr. DeSpain volunteered to use his name, but anyway, the first escrow was made to Mr. DeSpain and his wife."

DeSpain and his wife signed an escrow instruction in which they purported to buy a lot from appellant for \$2450 [T 243, Gov't Ex. 24-A], and a second escrow at the same time in which the DeSpains purported to sell the same lot to Wilder for \$1550 [T 244, Gov't Ex. 25-A]. DeSpain paid no moneys at all in connection with the escrows [T 244], took no part in preparing the escrow papers [T 245], and was a purchaser in name only [T 256]. Both escrow instructions were prepared by appellant [T 478], and were used at the Pico-La Cienega Branch of the Bank of America [Gov't Exs. 24-A and 25-A].

The G. I. loan to Wilder was made by the Bank of America, Santa Monica Branch. That branch reported the loan to the Veterans Administration on the Home Loan Report [Gov't Ex. 4-A], which contained a certification by the bank that the price paid by Wilder for his lot was \$1550.00, and that such price did not exceed the reasonable value as determined by proper appraisal. The normal bank practice was to fill out the Home Loan Report from documentary evidence in the bank file, principally copies of the Pico-La Cienega escrow instructions and statements [T 38, 47, 55, 56, 269, 271, 272, 281, 282, 311, 313, 314, 315], because the bank officer who made the certification would not have talked personally to the veteran [T 269]. The Santa Monica branch would have requested documentary evidence from Pico-La Cienega as to the purchase price paid by Wilder for the lot, and would, of course, have been furnished a copy of the escrow instruction and escrow statement of the only escrow to which Wilder was

a party, *i. e.*, the one between DeSpain and Wilder at \$1550 [T 37, 45, 300, Gov't Exs. 13-A and 13-B].<sup>1</sup>

The other double escrows (Counts 4, 11, 12 and 14) followed the same identical pattern, the only differences being as to the persons used in the double escrow transactions,<sup>2</sup> and the amounts of the unreported cash side payments.<sup>3</sup>

The Kornfeld transaction (Count 9) was a single escrow transaction. Kornfeld bought a \$1750 lot, paying \$250 in cash, representing the amount in excess of what the G. I. loan would cover [T 141, 479]. Only one escrow was used, from Karrell to Kornfeld, reciting a sales price of the lot of \$1500 [Gov't Ex. 27-A], instead of the true price of \$1750. The escrow papers said nothing of the \$250 paid out of escrow. Kornfeld's wife noticed when they signed the paper that it was for \$1500, and not for the full \$1750, and asked about it. Appellant said it was a mere formality to make the paper conform with the maximum loan possible [T 144, 154-5]. The sale price of the lot was reported to the Government at \$1500, instead of the true price of \$1750 [Gov't Ex. 6-A], the Santa Monica branch using the escrow instructions in the same fashion as in the double escrow cases.

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<sup>1</sup>Payment for the lots was achieved as follows: The indicated cost of the lot, \$1550, would be transferred from the loan funds of Santa Monica to the \$1550 escrow at Pico-LaCienega by non-negotiable order [Gov't Ex. 13-C]. At Pico-LaCienega, the proceeds of the \$1550 escrow would be transferred to the \$2450 escrow [Escrow Work Sheets, Gov't Ex. 24-B and 25-B]. The \$2450 escrow instructions would recite that \$900 cash was paid out of escrow. The \$1550 transferred and the \$900 out of escrow would make up the price [Gov't Ex. 24-A].

<sup>2</sup>Bentivegna [T 469]; Chamberlain [T 218, 482]; Regester [T 179, 181, 482]; Higgins [T 160, 161].

<sup>3</sup>Bentivegna \$600 [T 124, 125, 468, 469]; Chamberlain \$700 [T 218, 484]; Regester \$600 [T 178, 483]; Higgins \$300 [T 159, 160].

Appellant admitted the basic facts—*i. e.*, the cash payments out of escrow and the amounts [T 468-9, 472, 477, 479, 484, 505-6] and the uses of the double and single escrows. As to the double escrows, she said [T 469]:

"Well, I don't remember the exact words I told him, but in substance it was the same as I had told all the rest of the GI's; that we had to open two escrows and one of them was for the amount of the loan and the other was for the purchase price of the lot."

Of the single escrows, she said [T 480]:

"Well, the same reason in this case as it was in the other one; some of them were two escrows and some of them were one, and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

Appellant was given blank escrow instructions by the Pico-La Cienega branch. She took them away and returned them filled out and signed [T 331-2]. Appellant conceded that she drew up the escrow instructions in her office [T 463, 478]. Appellant also admitted she knew that all the veterans were buying under G. I. loans [T 500].

Appellant had the equivalent of a college degree, having completed a business and an art course [T 503]. She had owned and operated a business known as the Acme Board of Creditors. If a person became involved financially and could not meet his obligations, he could go to Acme and appellant would work out a budget, receive all his income, and pay his obligations [T 503-4]. In July of 1945, after taking a course of instruction, appellant passed the examination and received a California Real Estate Broker's License [T 494-5]. Despite this, appellant testified that

she was not familiar with methods of handling escrows [T 455, 474, 499]. At one time she contended that the Bank of America told her how to make out the escrow papers [T 456-457, 463-4], and at another time that the builder of the houses told her [T 498-9], and at another time that all the bank should have been interested in, in her assumption, was the amount of the loan, not the price [T 480].

The basic figures as to each count are set forth in the following table:

Count & Veteran	Sales Price Reported in Home Loan Report	Lot Appraisal	Price Actually Paid
4 Bentivegna	\$1550 (Gov't Ex. 2A)	\$1650 (Gov't Ex. 2B)	\$2150 [T 125]
6 Wilder	1550 " " 4A	1750 " " 4B	2450 [T 198]
9 Kornfeld	1500 " " 6A	1500 " " 6B	1750 [T 144]
11 Chamberlain	1300 " " 7A	1500 " " 7B	2000 [T 217]
12 Regester	1550 " " 8A	1650 " " 8B	2150 [T 178]
14 Higgins	1750 " " 9A	1750 " " 9B	2050 ]T 160[

### Summary of Argument.

The argument is divided into five parts. (1) The first part deals with appellant's attacks on the sufficiency of the indictment to charge a crime, because of alleged deficiencies in the statutes and regulations on which it is based, and demonstrates the validity of such statutes and regulations. (2) The second part discusses whether appellant is charged as a principal or, as appellant mistakenly asserts, as an accessory. (3) The third part demonstrates that the evidence is sufficient to sustain the verdict. (4) The fourth part explains why the portion of the sentence dealing with restitution should stand. (5) The last part merely affirms the denial by the court below of various motions, and raises no questions not discussed in the four preceding parts.

I.

**The Indictment Charges a Crime Under Valid Statutes.**

**A. It Is a Criminal Offense to Cause a False Certificate to Be Submitted.**

Appellant objects to the sufficiency of the indictment to state a criminal offense on the grounds: (1) that the statute does not call for the certification as to price on which the indictment is based (AB 8-9); and (2) the regulations requiring such certification are not authorized (AB 13-16).

The policy and procedure as to G.I. loans to purchase homes are set forth in the statutes and regulations. To be eligible for guaranty, the loan must be on property for which the price to be paid does not exceed the reasonable value thereof as determined by proper appraisal made by an appraiser designated by the Administrator (38 U. S. C. 694a). The statute further gives the Administrator power to promulgate rules and regulations necessary and appropriate for carrying out the provisions of the statute (38 U. S. C. 694d). One such regulation, duly promulgated, is that the lender shall certify, before the guaranty is issued, that the loan has been made in "full" accordance with the terms and provisions of the Act (Sec. 36:4303; 11 F. R. 2120). This certification is made on the Home Loan Report, a form filled out by the lender, which both reports the making of the loan and contains certifications by the lender that various requirements of the Act have been met.

The statute and regulations must be read together. Regulations requiring a certification as to the facts making the loan eligible under the statute are certainly

necessary and appropriate to carry out the provisions of the Act. Appellant's argument that the Administrator cannot promulgate regulations the violation of which is a crime (AB 14-15) misses the point.<sup>1</sup> He can promulgate regulations to carry out the Act, such as requiring some proof, by certification or otherwise, that the loan to be guaranteed is eligible. When a false certification is made, it violates any statute making it a crime to make false certificates to the Government.<sup>2</sup> Cases have gone far, particularly under Section 80 of Title 18 (1946 Ed.), in finding false statements required by regulations or government forms to fall within criminal statutes covering false statements to the government. *Cf. Fuller v. U. S.*, 110 F. 2d 815, 817 (C. C. A. 9, 1940) cert. den., 311 U. S. 669; *U. S. v. Zavala*, 139 F. 2d 830, 832 (C. C. A. 2, 1944); *Sanchez v. U. S.*, 134 F. 2d 279, 283 (C. C. A. 1, 1943), cert. den. 319 U. S. 768; *U. S. v. Barra*, 149 F. 2d 489, 490 (C. C. A. 2, 1945); *Todorow v. U. S.*, 173 F. 2d 439, 444 (C. C. A. 9, 1949), cert. den. 93 L. Ed. 1040. In *Marsani v. U. S.*, 168 F. 2d 133, 141-2 (Ct. of Ap. Dist of Col., 1948), oral statements to an official charged generally with enforcing a law,

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<sup>1</sup>Even on this point, appellant does not state the law accurately. Cf. the innumerable criminal prosecutions for violations of the numerous regulations issued by Federal officials, such as O.P.A., W.P.B. and O.H.E. regulations, to name but a few.

<sup>2</sup>The false statement here was also a violation of Section 80 of Title 18 (1946 Ed.). Prosecution as a matter of policy was brought under the penal provisions of the Servicemen's Readjustment Act, a misdemeanor, because it was felt that this would more nearly approximate the Congressional intent than a felony prosecution under Section 80.

and not required by any regulation, were held within the statute. The Supreme Court affirmed the conviction without opinion, by an equally divided Court, in 335 U. S. at 895 and 336 U. S. at 922. Appellant here is not charged with violating the regulation by selling at more than the reasonable value, but with violating a criminal statute by causing a false certificate to be made to the Government as to what was actually paid. To be blunt, the crime is not overcharging, but lying.

A contention analogous to that of the appellant here was made in *Heald v. U. S.*, decided July 7, 1949, by the United States Court of Appeals for the Tenth Circuit, and as yet unreported. In that case the indictment charged a conspiracy to defraud the Government in causing the United States Veterans Administration to guarantee a loan by falsely representing the selling price of the house covered by the loan. In the course of its opinion, the Court said:

“It is true, as contended by appellants, that the sale of the house was not a matter which was within the jurisdiction of the Veterans Administration, but passing upon applications for guaranteed loans in connection with such sales was within its jurisdiction, and the false representations which appellants caused to be made pertained to matters within its administration as an agency of the United States. *Todorow v. United States*, 173 Fed. 2d 439.”

Appellant's points that neither the statute nor regulations call for the certification are not well taken.

**B. Section 1500 (38 U. S. C. 697) Is a Valid Penal Statute.**

**1. INTRODUCTION.**

Appellant objects that the penal statute here involved is bad because it involves an ineffectual incorporation by reference (AB 16-18, 20-21).

The Government contends that Section 715 is validly incorporated into the Servicemen's Readjustment Act by inexpert but adequate language, and that the practical effect of Section 1500 is to amend Section 715 so that it prohibits the use of false papers "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944."

Section 1500 provides (38 U. S. C. 697):

"Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections . . . 715 . . . of this title . . . shall be for application under this chapter . . ."

**2. DISTRICT COURT DECISIONS.**

A reported case squarely in point is *U. S. v. Oakland*, 81 F. S. 343 (W. D. La., 1948). Defendants there moved to dismiss an information brought under Section 697 of Title 38 that charged the defendant with falsely stating the purchase price of a home in an application for a Home Loan Guaranty. Defendant asserted that the information "does not set forth or allege the commissions of an offense against the United States . . .," in that the statutes under which it was laid "are so vague and indefinite, fail to set forth a comprehensible, intelligent, definitely ascertainable standard of criminal responsibility" and are also unconstitutional under the 5th

and 6th amendments. After quoting Section 715 of Title 38, Chief Judge Dawkins said (81 F. S. 344) :

“Whatever may be said as to other offenses under the Act of June 22, 1944, a false statement of the character charged in the bill clearly falls under and only under the last quoted statute, which, in effect, is made part of the said World War II Veterans Act of June 22, 1944. It deals entirely with false statements or representations made to any agency or department of the Government in the prosecution of a claim for money, property, or other benefits. See *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748, and also *United States v. Gilliland*, 312 U. S. 86, 61 S. Ct. 518, 85 L. Ed. 598.

“It is not believed necessary to discuss at length the principles and jurisprudence on the question of the adoption of provisions of earlier statutes by subsequent acts of Congress. It suffices to say that I believe there can be no confusion or doubt about the applicability of the law in the manner stated in the present case.”

In this circuit, Judge Yankwich had the same problem before him in *U. S. v. Selph*, 82 F. S. 56, 58 (S. D. Calif., Jan. 27, 1949). That case also involved a motion to dismiss an indictment charging the making of a false statement under these statutes. In his written opinion, Judge Yankwich stated briefly (82 F. S. 56, 58) :

“Section 715 of Title 38 U. S. C. A., punishes both him who knowingly makes or *causes* to be made, and him *who aids or assists in*, or procures the making or presentation of, the false or fraudulent statement or writing denounced. Section 697 of Title 38 makes the section applicable to claims under the Servicemen’s Readjustment Act of 1944, 38 U. S. C. A. §697.”

In oral remarks supplementing this written opinion, Judge Yankwich said, in part [Trans. Jan. 27, 1949, p. 10]:

“However, the Congress may constitutionally adopt sections contained in other acts, and may in one penal statute make applicable to an event which occurs at a later date the penalties of the pre-existing statute, and I think that Sec. 697, although inexpertly drawn, achieves this purpose. The section says:

“‘Except as otherwise provided in this chapter, the administrative, definitive, and penal provisions under Sections 30a and 485 of Title 5, and Sections . . . 712-715 of this title, . . . shall be for application under this chapter.’

“What they say, in rather an awkward way, is that they shall apply under this chapter, and it is quite evident that they intend to apply, all the administrative rights and remedies and definitions, and they use definitive in the sense of final. They specifically designate penal provisions, and I believe if they had left out penal provisions in the chapter, they would have brought all the chapter into play.

“By referring to Sections 712-714, I believe it leaves no room for doubt that what they intended to do was to apply these sections to instruments to be prepared under the Veterans Act, so as to apply the pre-existing statute to the new situation which has arisen by reason of the passage of the Veterans Act.”

The same ruling has been made in each case in which the question has been raised in the Southern District of California.<sup>1</sup>

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<sup>1</sup>*United States v. Theodore*, No. 19981, 9/24/48, Judge Peirson M. Hall.

*United States v. Selph*, No. 20023, 9/24/48, Judge Peirson M. Hall.

The valid incorporation by Section 697 of Title 38 of non-penal provisions of the statutes enumerated therein has apparently been assumed without question in *Slocumb v. Gray*, 82 F. S. 125, 126 (Dist. of Col. 1949) and *International Union v. Bradley*, 75 F. S. 394, 396 (Dist. of Col. 1948).

### 3. THE CONGRESSIONAL INTENT WAS TO INCORPORATE SUCH PENAL STATUTES.

A reading of the legislative history of the Servicemen's Readjustment Act of 1944 demonstrates the Congressional intent to integrate that Act with the existing Federal legislation on veterans' benefits in order to provide for a uniform system of administration and sanctions. An explanation of the purpose of Section 1500 is found in Senate Report No. 755, 78th Congress, 2nd Session (Senate Report 78-2, Volume 3-59), wherein it is stated:

“Section 1600<sup>1</sup> makes applicable to all the titles of the act, except as otherwise provided therein, the administrative, definitive, or penal provisions of Public Law 2, Seventy-third Congress. This integrates the entire act with the system of benefits initiated under and authorized by said Public Law 2, Act of March 20, 1933, and the Veterans Regulations issued thereunder as subsequently amended by statutory enactment. Among other things it makes applicable the definition of the term ‘person who served’ as in-

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*United States v. Branum*, No. 20337, 11/8/48, Judge Peirson M. Hall.

*United States v. Selph*, No. 20657, 6/6/49, Judge Jacob Weinberger.

*United States v. Young*, No. 20329, 2/25/49, 3/3/49, Judge William C. Mathes. This case is presently before this court on appeal as *Young v. U. S.*, No. 12226, on this very point.

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<sup>1</sup>Now Section 1500 (38 U. S. C. 697).

cluding any person, male or female, commissioned, enlisted, enrolled, or drafted, who served in any of the armed forces of the United States, including the Army, Navy, Marine Corps, Coast Guard, or any of the components thereof. Likewise it will make applicable the provisions of section 5, Public Law 2, concerning the finality of decisions of the Administrator, except as otherwise provided, but it would not carry forfeiture for fraud under title V inasmuch as the penalties for fraud under said title are specifically provided in section 1400.”<sup>2</sup>

This shows clearly that the Congressional intent was to carry over into the Servicemen’s Readjustment Act both the administrative and penal provisions of Public Law 2.

The fact that there is an express penal clause (Sec. 1301, 38 U. S. C. 696*l*) in Title V of the Servicemen’s Readjustment Act, dealing with Employment Readjustment Allowances, and no special penal clause in Title III, dealing with loans, does not mean that Congress meant to impose no criminal penalties as to loans. Section 1500 is in Title VI of the original act, and that title, the last one of the act, begins as follows (58 Stat. 300):

“TITLE VI.

CHAPTER XV.—GENERAL ADMINISTRATIVE AND  
PENAL PROVISIONS.

Sec. 1500. Except as otherwise provided in this Act . . .”

The final title is the logical position for a general penal provision applying to the entire Act, and that is where Section 1500 was put.

The true explanation for Section 1301 (38 U. S. C. 696*l*) is that, in connection with Employment Readjust-

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<sup>2</sup>Now Section 1301 (38 U. S. C. 696*l*).

ment Allowance under Title V, the veteran was to deal directly with the local State agency instead of the Federal Government. The question might arise as to whether a false statement made to a State agency would constitute a criminal offense under Section 715, even though the Federal Government reimbursed the State agency for the funds it disbursed. To obviate this possible technical objection, Congress provided a specific criminal penalty for false representations in connection with claims for allowances under Title V. It must be borne in mind that in writing Title V Congress was attempting to coordinate this title with existing State legislation relating to unemployment compensation.

**4. THE AUTHORITIES ON INCORPORATION BY REFERENCE SUPPORT THE ABOVE RULINGS OF THE DISTRICT COURTS.**

At the outset it should be noted that Section 715, standing by itself, states a crime definitely enough. In essence it states a crime similar to that outlined in Section 80 of Title 18 (1946 Ed.), but limits the crime to false statements concerning certain claims for benefits. This is a sufficient delineation of a crime, and the statute is not invalid because of indefiniteness. *Cf. U. S. v. Gilliland*, 312 U. S. 86, 91 (1941).

It is the Government's contention that Section 715 is incorporated into the Servicemen's Readjustment Act, and that in practical effect this incorporation makes Section 715 read "concerning any claim for benefits under the Servicemen's Readjustment Act of 1944." It would have been better had Congress so expressly amended the statute, but the method followed sets forth a crime with sufficient definiteness.

(a) INCORPORATION BY REFERENCE GENERALLY.

Incorporation by reference is a not uncommon practice in federal legislation. The Supreme Court early stated in *Kendall v. United States*, 12 Pet. (37 U. S.) 524, 625 (1838):

“It was not an uncommon course of legislation in the states, at an early day, to adopt, by reference, British statutes; and this has been the course of legislation by congress in many instances where state practice and state process has been adopted.”

See, also, Chief Justice Marshall in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 207-208 (1824). In many states constitutional provisions now prohibit these legislative shortcuts, but there is no such federal prohibition. Hence, there can be no objection to incorporation by reference, as such.

(b) INCORPORATING A LIMITED STATUTE.

One difficulty raised in the present case is that Section 715 is limited on its face to claims for benefits under specific statutes, and this enumeration does not include the Servicemen's Readjustment Act of 1944, which was enacted eleven years after Section 715. However, the clear intent of Congress was to make Section 715 applicable to the Servicemen's Readjustment Act, and under the cases this is sufficient.

In *Alton Railroad Co. v. United States*, 315 U. S. 15, 18-20 (1942), the question was raised of the rights of certain railroads to bring suit to set aside the granting of a certificate of convenience and necessity as a common carrier by motor vehicle to one Fleming. The court stated (315 U. S. 19):

“. . . They rest their right to sue on §205(h) of the Motor Carrier Act (49 U. S. C. Supp. §305(h)) which provides that ‘Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I . . .’ Sec. 1(20) of Part I (49 U. S. C. §1(20)) authorizes ‘any party in interest’ to sue to enjoin any construction, operation or abandonment of a railroad made contrary to §1(18) or (19). Such suits may be maintained not only where the railroad proceeds without authorization of the Commission, but also where it proceeds under a certificate of the Commission whose validity is challenged. *Claiborne-Annapolis Ferry Co. v. United States*, 285 U. S. 382. Hence we conclude that §205(h) has incorporated by reference the ‘party in interest’ provision of §1(20) . . .”

It is to be noted that Section 1(20) of Part I, which was incorporated into the Motor Carrier Act, applied on its face only to suits concerning railroads. See, also, *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 391-392 (1924), and *Engel v. Davenport*, 271 U. S. 33, 38-39 (1926), arising under the Merchant Marine Act of 1920, and a similar limiting provision.

In *The Brazil*, 134 F. 2d 929 (C. C. A. 7, 1943), a libel for forfeiture of a vessel because of sale to an alien was brought under Section 836 of Title 46 (Shipping), which provided that forfeitures “may be disposed of in the same manner, as forfeitures incurred for offenses against the law relating to the collection of duties.” The Customs Act (Section 1621 of Title 19, Customs Duties) provided that “No suit or action to recover any pecuniary penalty

or forfeiture of property accruing under the customs law . . . " shall be instituted except within five years of discovery of the offense. The court applied these provisions of the Customs Act, finding that to be the clear intent of Congress. It should be noted that the statute thus incorporated was limited on its face to "forfeiture of property accruing under the customs law," and that the statute incorporating it did so generally, and not by specific citation. A similar result was reached in this Circuit with little discussion in *The Tahoma*, 87 F. 2d 349, 354 (C. C. A. 9, 1936) involving substantially the same statutes, in reliance on a series of prior decisions in the First Circuit.

(c) INCORPORATING CRIMINAL STATUTES.

While it is true that the cases cited above deal with statutes which are not criminal, criminal statutes have been incorporated by reference. The most extreme example is the Assimilative Crimes Act (18 U. S. C. 13). That statute makes criminal any act or omission committed in certain places within the special jurisdiction of the United States if such act or omission is a crime by the law of the state in which such place is situated, although such act or omission is not made a crime by Congressional enactment. This statute thus incorporates into federal law state statutes generally, without specifying them by any citation whatever. See, also, Section 1114 of Title 18, which, though in language only incorporating the punishment imposed in Sections 1111 and 1112 of Title 18, in fact must incorporate most of their substantive provisions so that the punishment can be fixed.

The constitutionality of the Assimilative Crimes Act has long been settled by *Franklin v. United States*, 216

U. S. 559, 568-570 (1910). That statute raises many problems not present under Section 697. Under the Assimilative Crimes Act, not only must state law be consulted to see if a crime has been committed, but a very difficult question sometimes arises as to whether a federal criminal statute precludes prosecution under the State statute defining a slightly different crime. Cf. *Williams v. United States*, 327 U. S. 711 (1946). The time of enactment or amendment of the state statutes is always important, in that only those state statutes are imported into federal law that were in existence when the Assimilative Crimes Act, or its latest amendment, was passed. *United States v. Paul*, 6 Pet. (31 U. S.) 141 (1932). See, also Frankfurter, dissenting, in *Johnson v. Yellow Cab Co.*, 321 U. S. 383, 398-399 (1944). No such problem is presented here, because Section 715 was in the Code when 697 was enacted, and has not been amended since.

A guide to the degree of vagueness permissible in criminal statutes incorporating other statutes is furnished by *United States v. Stafoff*, 260 U. S. 477, 479-480 (1923). A prior decision of the Supreme Court had held that certain criminal provisions relating to the making of alcoholic beverages in violation of Internal Revenue requirements had been repealed by the National Prohibition Act. Congress thereupon passed an Act supplemental to the National Prohibition Act providing that "all laws in regard to the manufacture and taxation of and traffic in intoxicating liquor, and all penalties for violations of such laws that were in force when the National Prohibition Act was

enacted, shall be and continue in force, as to both beverage and non-beverage liquor, except such provisions of such laws as are directly in conflict with any provisions of the National Prohibition Act or of this Act." In discussing this new statute, Mr. Justice Holmes said (260 U. S. 480):

"But the Supplemental Act that we have quoted puts a new face upon later dealings. From the time that it went into effect it had the same operation as if instead of saying that the laws referred to shall continue in force it had enacted them in terms. The form of words is not material when Congress manifests its will that certain rules shall govern henceforth. *Swigart v. Baker*, 229 U. S. 187, 198 . . ."

It should be noted that this Supplemental Act referred vaguely to a body of statute law, without identifying the specific statutes involved, and further, that once such statutes should be identified, there would be the further question of whether they were directly in conflict with the National Prohibition Act or the Supplemental Act itself. This lack of specific identification should be contrasted with the direct citation of the statutes incorporated in the present case. It is true that the words of incorporation—"shall be for application"—could be improved upon, but the will of Congress is manifest, and the form of words is not material. Hence, it is a criminal offense under Sections 697 and 715 of Title 38 to knowingly cause a false certificate to be made concerning a claim for benefits under the Servicemen's Readjustment Act of 1944.

**C. The Act Imposes Criminal Penalties Upon Appellant.**

**1. SECTION 715 APPLIES TO “ANY PERSON.”**

Appellant argues that, even assuming the criminal provisions are valid, Section 715 applies only to veterans because several of the sections just prior to 715 appear to apply only to veterans, and because Section 715 provides, in part, for a forfeiture of veterans' benefits (AB 18-21).

Section 715 provides that “any person” who does certain acts “shall forfeit all rights, claims, and benefits under such sections, and, in addition to any and all other penalties imposed by law, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than \$1000 or imprisonment for not more than one year, or both.”

The sections just prior to 715 indicate a nice discretion. Thus 713 applies to “any person entitled to payment of pension” who fraudulently accepts it after the reason for it ceases. Continuing to receive a pension after your right to it ceases can be done only by a person entitled to a pension, and the statute is so limited. On the other hand, Sections 712 (“whoever”), 714 (“whoever”) and 715 (“any person”) cover actions which can be done by a veteran or a non-veteran, and their broad language is in contrast to Section 713. Appellant's contention would rule out from the plain coverage of these statutes the case of a person, not a veteran, falsely seeking benefits. Section 715 says “any person”—not “any person entitled to rights under this statute”—as does Section 713. The forfeiture of rights is a common clause, but it does not require, in

the face of the broad "any person" language, that a person have rights to violate the statute.

## 2. STATE COURT DECISIONS.

Appellant argues that, based on State decisions, it is apparent that Congress made no penalty as to a false loan statement (AB 10-11). Appellant relies on certain Washington cases which hold in civil litigation between the seller and the purchaser-veteran that it is not illegal to charge more than the amount of the appraisal. The cases cited by appellant (AB 10-11) are contrary to the more realistic opinions of the Superior Court of California in *Cordell v. Fletcher*<sup>1</sup> and of the Louisiana Court in *Diamond v. Willett*, 37 So. 2d 338 (La. Ct. of Ap. 1948).

Appellant's argument misses the point, which is that appellant is not convicted of charging more than the amount of the appraisal, but of causing false certificates to be made as to what was paid.

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<sup>1</sup>Decided 12/30/48 by Judge Wm. B. McKesson, Los Angeles County Superior Court, Case No. L. B. C. 14435, unreported.

II.

**Appellant Is Guilty as a Principal.**

Appellant argues that because the Bank of America made the false certificates, appellant is only an aider and abettor, and can be found guilty only if the bank is guilty (AB 22-25).

In the first place, appellant is charged, not as an aider and abettor, but as a principal. The statute makes it a crime to "cause" a false certificate to be made, and the indictment charged that appellant did "cause" a false certificate to be made. The same point was raised on a similar indictment in *U. S. v. Sciph*, 82 Fed. Supp. 56, 58-60 (S. D. Calif., 1949). The District Court, through Judge Yankwich, discussed the authorities at length and sustained the indictment, pointing out that the defendant was charged as a principal, and not as an aider and abettor, and that a principal can cause a crime to be committed through an innocent agent and even though the principal could not have committed it directly. See also *Jin Fuey Moy v. U. S.*, 254 U. S. 189, 192 (1920); *Spear v. U. S.*, 228 Fed. 485, 488 (C. C. A. 8, 1916), cert. den. 246 U. S. 667; *Tincher v. U. S.*, 11 F. 2d 18, 21 (C. C. A. 4, 1926), cert. den. 271 U. S. 664. It is perfectly apparent in the present case that appellant is charged as a principal and that the rule that an aider and abettor can be convicted only if the principal is guilty does not apply.

Appellant also asserts that she was guilty, if anything, of "mere acquiescence or inaction or failure to report the true price" (AB 23). The record is quite the opposite. Appellant took pains to have double escrows set up, so that a false price would be reported, and the true price concealed, and to have a false price used in cases of single escrows.

III.

The Evidence Is Sufficient to Support the Conviction.

The evidence was more than ample to sustain the conviction.

Appellant's scheme had two stages. There was the first stage, wherein appellant took affirmative action and created the deliberately deceptive escrow papers. Then there was the second mechanical stage, wherein the papers were handled by the banks in their regular routine fashion. Of the objective facts in the two stages there is no dispute. The only dispute is as to the intent with which they were done. As to that, the objective facts are eloquent.

First, let us consider the mechanical stage. The false certifications as to the prices paid by the veterans for the lots and as to the fact that the veterans were not paying more than the amounts of the appraisals were made by the Santa Monica branch of the Bank of America in the Home Loan Reports [Gov't Exs. 2A, 4A, 6A, 7A, 8A and 9A]. The certifications used the lot sales prices contained in the escrow instruction in which the dummy sold to the veteran, if it was a double escrow transaction [Gov't Exs. 22A, 25A, 29A, 31A, 33A], or in the single false escrow where no double escrow was used [Gov't Ex. 27A]. It was customary practice for the bank to base its certification as to the lot price on the documentary evidence furnished it—*i. e.*, the escrow instructions and statements covering the lots forwarded to Santa Monica by Pico-La Cienega [T 37-38, 47, 55-56, '269, 271-272, 281, 311, 313-314]. It is apparent that when asked to forward an escrow covering the sale of a certain lot to a named veteran, the bank would forward that escrow—*i. e.*, the second escrow between the dummy-seller and the veteran,

and not the first escrow, in which the veteran would not appear. This was the mechanical part of the transaction, the part as to which appellant needed only to rely on the usual and known business practices of the banks.

However, before the more or less mechanical portion of the process started, appellant had to, and, according to her admissions, did take certain affirmative action. In each case, she either used a double escrow, or a single escrow which did not recite the full price [T 480]. Appellant's candid admission of her concealment was [T 480]:

". . . and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

Appellant admitted suggesting a third person for the double escrows and stating to the veterans that the first escrow between her and the dummy was to be at the true price, and the second escrow between the dummy and the veteran was to be at the legal price [T 461-2, 469, 477-8, 482]. Appellant admitted that she filled out the blank escrow instructions in her own office, and not at the bank [T 463, 478], and that she knew all the transactions were G. I. loans [T 500].

A peculiar inconsistency of the double and single escrows illustrates that their true purpose was to deceive. In the case of the double escrows, the first escrow between appellant and the dummy would not only state the true price, but would recite the payment outside of escrow of the cash payment made by the veteran out of escrow [Gov't Exs. 21A, 24A, 28A, 30A, 32A; see AB 27-28]. This escrow is the one in which the veteran would not appear, and would not go to the loaning and reporting bank when the veteran's lot purchase escrow was requested. However,

when a single escrow directly between appellant and the veteran was used, the true price would not be stated, and the cash paid out of escrow would not be mentioned [Gov't Ex. 27A]. The obvious inference is that the entire scheme was to conceal the true price from the Government, as was so effectively done.

Appellant repeatedly stated she didn't know what escrows were for [T 455, 474, 499], and that she was merely doing as she was told by people who knew [T 456-7, 463-4, 498-9]. This despite the fact that she had been for over a year, not a mere real estate salesman, but a real estate broker [T 494-5]; that she had the equivalent of a college degree in business and art [T 503]; and had previously operated a prorate enterprise which ran the affairs of persons in financial trouble [T 503-4]. What the jury, to whom the question was properly left, thought of this is apparent from their verdict. Of the contention that appellant thought the double escrows were needed so the bank could be given an escrow showing the amount to be loaned, or the amount still due and owing after the cash payment. Judge Mathes said at the time of sentence [T 645]:

“Well, the defendant said so, but she is too smart a woman to have thought that, in my view, and I am sure that was the jury's view.”

Appellant contends that she had no knowledge of the actual appraisals (AB 26). The crime of which appellant was convicted is not charging more than the appraisals, but causing the true facts as to the prices paid to be concealed from the Government. For that it is not vital that appellant know the amount of the appraisal. However, as bearing on appellant's knowledge, she admitted that she knew that G.I. loans were involved in all cases

[T 500] and that she arranged before any of the lots were sold to have appraisers look at the lots for their suitability for G.I. loans [T 458]. Her salesman, De Spain, testified that she told him the amount of the appraisals [T 258, 261, 262, 264].

Appellant makes much of the point that the first escrows of the double escrows, those between appellant and the dummies, disclosed the true facts. She contends that the Pico-La Cienga branch of the Bank of America, where such escrows were, must be charged with knowledge of them, and that Santa Monica and Pico-La Cienega are but branches of the same bank, so that there was no causing a false statement to be made (AB 27-34). It is true that there was information at one branch which, if examined, might raise a question. However, appellant set up the double and single escrows so that, if the bank followed its normal procedures, a false figure would be reported to the Government. There is no evidence in the record of collusion between anyone in the bank and appellant, nor even any evidence that anyone in the bank had actual knowledge at the time of the true sales prices. The evidence was that appellant so rigged the transactions that if the bank followed its normal practices, false prices would be reported, and that is exactly what happened.

The testimony of Schacklett, alluded to at page 27 of Appellant's Brief, related only to papers in the first escrow of the double escrows, those on which the veterans' names did not appear. These papers never reached the Santa

Monica branch. Williams never testified that any papers in the second escrows, those on which the veterans' names appeared and which were forwarded to the Santa Monica branch, showed any payments out of escrow, and an inspection of such escrows [Gov't Exs. 22A and B, 25A and B, 29A and B, 31A and B and 33A and B] will show that he could not so testify (*cf.* AB 27).

On the undisputed evidence and appellant's own admissions, it is thus clear that there was abundant evidence to sustain the conviction.

#### IV.

##### The Validity of the Sentence.

Appellant contends that the sentence is bad in that it orders restitution in circumstances not covered by the statute (AB 34-36).

In the first place, this objection is one which is not specified in Appellant's Statement of Points on Appeal [R 34-35]. See *Bchn v. Campbell*, 205 U. S. 403, 409-410 (1907). It is, therefore, not before the Court. In the second place, objection to the sentence was not made at the time it was imposed. Appellant had ample notice of what the Court intended to do prior even to the imposition of sentence, since the question of the amounts of restitution and who should receive it was discussed in open Court one week prior to sentence [T 657-659]. Further, appellee served on appellant prior to sentence a statement naming all the veterans as to whom restitution was sought

and the amounts [T 659, 666, 667]. The question of the sentence is raised for the first time in appellant's brief.

If this Court is inclined to consider the question on its merits, Section 3651 of Title 18 gives the judge the power to place a defendant on probation "upon such terms and conditions as the court deems best". It then continues:

"While on probation and among the conditions thereof, the defendant . . . May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and . . ."

The sentence imposed was the same on each count, to be concurrent. Appellant was sentenced to imprisonment for one year and a fine of \$1000, with execution thereof suspended and appellant placed on probation for five years, the conditions being that she should make restitution of \$7300, the proceeds thereof to be used to reduce the loans of eighteen named veterans, and that she pay a fine of \$2700 [R 27-31]. The total pecuniary cost to appellant by this was thus to be \$10,000, and the restitution was obviously an integral part of the overall sentence and probation intended to be imposed by the judge. The restitution as to each veteran as fixed by the court was the difference between what was actually paid by the veteran and what was reported to the Government, *i. e.*, the financial extent of the lie [T 668, 670-1].

The distribution of the eighteen veterans to whom restitution was ordered, is as follows:

	Count	Veteran	Restitution Ordered
a) Counts on which conviction had	4	Bentivegna	\$600
	6	Wilder	900
	9	Kornfeld	250
	11	Chamberlain	700
	12	Regester	600
	14	Higgins	300
b) Counts where jury found appellant guilty, but judgment of acquittal entered by Court.	2	Weinstein	450
	5	Friedlander	200
c) Counts dismissed because no evidence offered.	1	Booth	250
	3	Marklin	500
	7	Rosenstone	500
	8	Orlansby	200
	10	Fowler	450
	13	Howell	300
	15	Schwarz	250
	16	Kirkpatrick	300
	17	Abramson	300
d) Not in indictment.	....	Stein	250

Such restitution was not to be made to the veterans directly, but to be applied on their loans, so that, while the veteran would benefit by reduction of the loan, the Government would benefit also from reduction of the guarantee on the loan [T 657]. As previously stated, the figures used were submitted in advance to the Court and

opposing counsel, and no question was raised as to the accuracy of the figures as such [T 667-668].

Appellant now contends that the sentence was invalid as to the probationary portion because (1) restitution was ordered for alleged offenses as to which no conviction was had, and (2) no actual damage or loss were shown to have been caused (AB 34-36).

The cases are not conclusive. In *United States v. Follette*, 32 F. S. 953 (E. D. Pa. 1940), Circuit Judge Maris, sitting as a District Judge, ruled that, where a defendant had pleaded guilty to embezzlement of \$203.99, the court could not make it a condition of probation that restitution of \$466.28 be made to the Surety Company, such being the amount paid the United States on a surety bond. However, in *United States v. Berger*, 145 F. 2d 888, 891 (C. C. A. 2, 1944), cert. den. 324 U. S. 848, the court sustained a probationary order covering the restitution of \$27,094.08 in unpaid overtime wages, the sum to be paid into a fund and "allocation of the said restitution among the said industrial workers and the amount to be paid to each is to be determined by the Director of the New York Regional Office of the Wage and Hour Division of the United States Department of Labor or under his direction." Thus, like the present case, the total restitution was fixed, but, unlike the present, the amount to each person was not. The court sustained the probationary order, because (1) one of the counts of the indictment charged a failure to keep accurate records of the amounts due employees, so that it was said there was a sufficient basis for the order; (2) the total amount of the restitution was stipulated by the parties; and (3) the money had been paid under the order to an escrow holder. It further appeared that the probation had been

terminated when the money was paid to the escrow holder. The present case is analogous in that the amounts of restitution were stipulated to. Likewise, no attack was made upon the order at the time it was entered.

However, irrespective of the decisions, the language of the probationary statute is clear enough. It permits probation "upon such terms and conditions as the court deems best." It then continues, "While on probation and *among* the conditions thereof . . ." and then enumerates three possible conditions (18 U. S. C. 3651). The general grant of power in the first phrase quoted above, and the language "*among* the conditions thereof" would be meaningless if the judge were limited in the terms and conditions of probation to the three things enumerated in the statute. And of course it is perfectly clear that he is not so limited. Most sentences contain as a condition of probation a requirement that the defendant obey all laws, and the rules and regulations of the probation office, as did the sentence here [R 30]. Thus, the clear language of the statute and the interpretation given it generally make it plain that a judge can impose terms and conditions "as the court deems best," and that he is not limited to the three terms and conditions enumerated in the statute.

Conceding that this is so, can a condition be imposed of the nature of the three enumerated conditions, but going beyond their scope. The emphasis of the probationary statute is not on punishment, but on rehabilitation and readjustment, and it should be so construed. It should

also be construed from a practical point of view. Thus, if the language defining the condition can be said to be a limitation, it is a limitation only in cases where the condition is imposed on a mute defendant, and the only facts before the court on which restitution can be based are those proven in the case. However, where additional facts and figures are admitted by the defendant in open court, a different situation is presented. Then fairness and equity require that restitution extend not only to that proven, but also to that admitted by defendant. There is also a practical reason for this. Courts commonly order restitution of the entire amount conceded to be involved, where proof was offered only as to part of the amount. Were the contrary necessary, in the present case, as an example, instead of a six day trial with evidence offered on eight transactions, to prove everything would have meant evidence on eighteen transactions. And the same would be true in every case of multiple transactions where restitution might be involved. The consequent increase in the load of the courts would be considerable. It is thus plain that, where the amounts are admitted, the court has power to order restitution on all transactions.

On the argument of loss, it is clear that there has been an actual loss or damage in this case. The difference between the reported price and the paid price represents an excess payment over what the Government thought was paid, and on the basis of which it guaranteed the loan. The loss or damage to the veteran is clear, the excess he has been forced to pay. As to the government, the pur-

pose of the G. I. loans was to lend the Government's credit to veterans, and to enable veterans to buy houses with little or no cash outlay. To the extent the veteran digs into his cash reserves to raise a side payment, he is less able in case of emergency such as sickness, or unemployment, to keep up his payments on the loan, and the Government is harmed.

If this Court should find that the probationary order is bad in part or in whole, this Court should not strike out part of the sentence, or attempt to recast the sentence, but should remand the matter to the District Court for resentencing in accordance with the law. The fine and probationary restitution provide a total penalty of \$10,000 to appellant, and establish a general plan of punishment and rehabilitation. The lower court should be afforded an opportunity to resentence appellant if the general plan it used is bad in part.

The cases are not helpful on what should be done as to a bad condition of probation. In *Springer v. U. S.*, 148 F. 2d 411, 415-416 (C. C. A. 9, 1945), two judges of this Court held a probationary requirement of giving blood to be void on its face and one which could be entirely disregarded, whereas one judge seemed to feel that the appellate court could not touch it, but that it was within the lower court's discretion to perhaps modify it. See also *Watkins v. Merry*, 106 F. 2d 360 (C. C. A. 10, 1939). Whether void or voidable, the conditions of probation here are so inextricably a part of each other and of the order as to require their entire reconsideration by the

court below.<sup>1</sup> As the Supreme Court has said in *Bossa v. U. S.*, 330 U. S. 160, 166-167 (1947) :

“The Constitution does not require that sentencing should be a game in which a wrong move by the judge means immunity for the prisoner.”

This Court should not grant a partial immunity by merely declaring void all or part of the restitution, without giving the lower court an opportunity to recast its sentence.<sup>2</sup>

## V.

### **Appellant's Motions (a) for a Judgment of Acquittal; (b) In Arrest of Judgment and (c) for a New Trial, Were Properly Denied.**

In her brief appellant raises no points in support of the above motions that are not previously discussed (AB 36-37). It follows that the above motions, in that they rely on points already discussed in this brief, were properly denied.

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<sup>1</sup>The lower Court will have considerable leeway to reframe the sentence. If it stays within the limits of the present sentence, there would be no question, but, it can also impose a sentence on a count heavier than the original sentence on such count, where that particular count sentence is found improper by the Court on appellant's motion. *Murphy v. Massachusetts*, 177 U. S. 155 (1900); *King v. U. S.*, 98 F. 2d 291 (Ct. of App., Dist. of Col. 1938).

<sup>2</sup>The Court can remand the case for resentencing. Thus, in *In re Bonner*, 151 U. S. 242, 262 (1894), the Supreme Court found a sentence improper on habeas corpus, and ordered a prisoner discharged “but without prejudice to the right of the United States to take any lawful measures to have the petitioner sentenced in accordance with law upon the verdict against him.”

### Conclusion.

The crime here charged is lying to the government, and not overcharging veterans. The statutes and regulations under which the prosecution are brought are sufficient, and the indictment based on them is valid. The evidence is largely uncontradicted, and points conclusively to guilt. The probationary order was proper. The judgment below should be affirmed.

Respectfully submitted,

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No. 12199

IN THE

United States Court of Appeals  
FOR THE NINTH CIRCUIT

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BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

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APPELLANT'S REPLY BRIEF.

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FILED

OCT 11 1944

PAUL P. O'BRIEN,

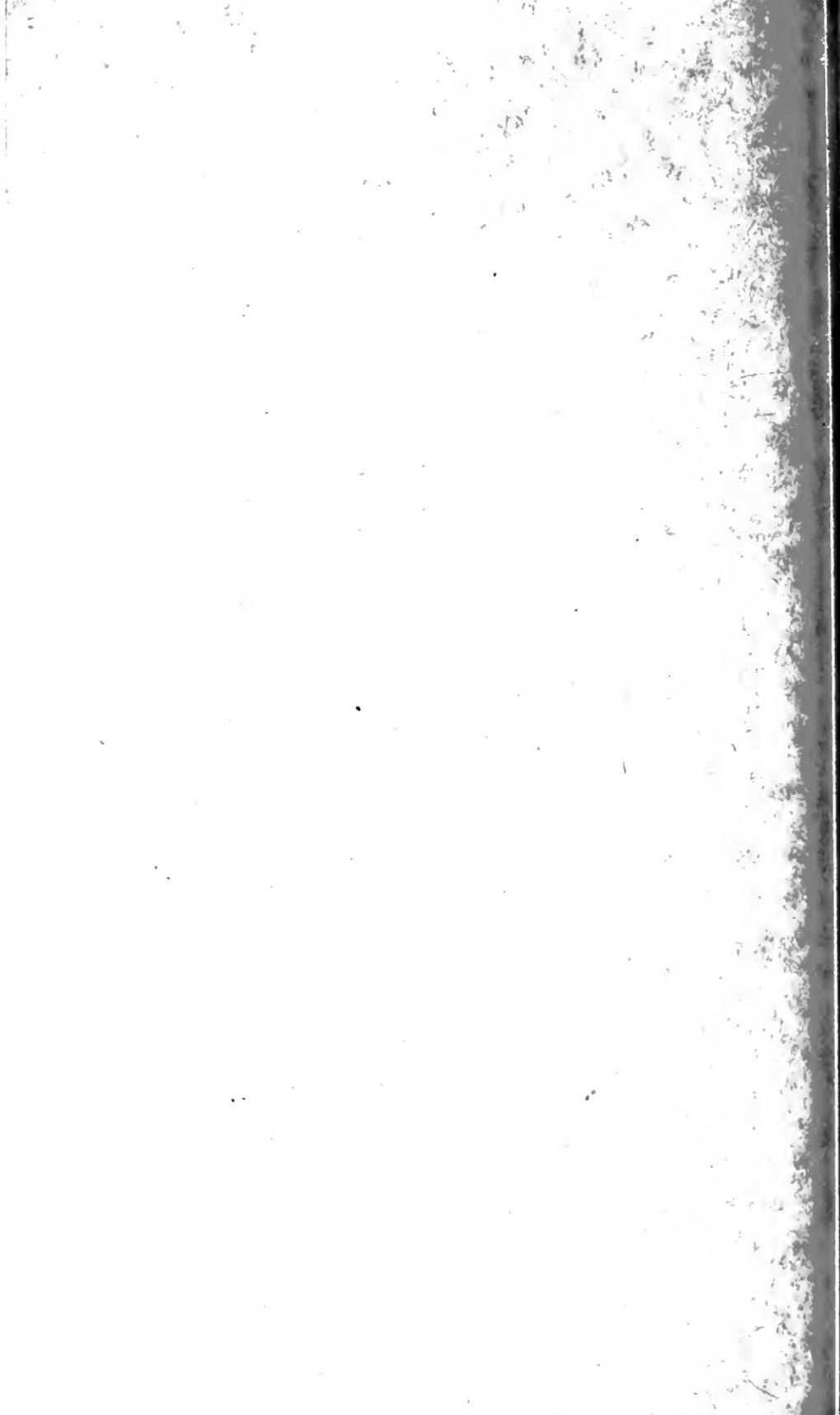
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IN THE

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## APPELLANT'S REPLY BRIEF.

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### Statement.

The major portion of the Government's Brief is devoted to the question whether the penal provisions of Section 715 of Title 38, U. S. C. A. (Act of March 20, 1933, 48 Stat. 11) are validly incorporated by reference into Section 697 of said Title (Act of June 22, 1944, 58 Stat. 300, as amended). But, the Government virtually ignores the equally, or more, important question that even if it be assumed that such provisions are incorporated into Section 697, they do not apply to the acts charged in the indictment. Mere incorporation is not enough; the incorporated provisions, to be effective, must prohibit and make punishable the particular acts charged in the indictment. (App. Op. Br. pp. 16-21.) Most of the remainder of the Government's Brief is devoted to the questions (a) whether the evidence is sufficient to support the conviction, and (b) whether the probationary conditions imposed by the sentence are valid.

## ARGUMENT.

### I.

#### The Indictment Does Not Charge a Punishable Offense Against the United States.

Each count of the indictment in this case charges the defendant with causing the Bank of America to make a false "certificate or paper" to the Veterans Administration, in that the price charged and received by her for the lot sold to the veteran did not exceed the appraised value thereof.

If the act charged in each count of the indictment is a punishable offense against the United States, it must be such because of the provisions of Section 715 of Title 38, U. S. C. A. There is no other federal statute prohibiting the acts charged. Moreover, Section 715, to be applicable, must have been validly incorporated by reference into Section 697.

##### A. Section 715 Is Not Incorporated into Section 697.

We shall not repeat the argument on this point, made at pages 16-21 of the Opening Brief. The Government recognizes the fatal weakness of its case, by saying (Gov't Br. p. 19) :

"It is the Government's contention that Section 715 is incorporated into the Servicemen's Readjustment Act, and that in practical effect this incorporation makes Section 715 read 'concerning any claims for benefits under the Servicemen's Readjustment Act of 1944.' It would have been better had Congress so expressly amended the statute . . .".

In other words, the Government suggests that this Court "in practical effect," read into Section 715 provisions that Congress wholly failed to make for any valid incorporation of that section into Section 697, passed eleven years later. But, this is not a proper judicial function.

"In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." (*United States v. Evans*, 333 U. S. 483, 486.)

To the same effect are:

*United States v. Hudson and Goodwin*, 7 Cranch 32, 3 L. Ed. 259;

*United States v. Britton*, 108 U. S. 199;

*United States v. Eaton*, 144 U. S. 677;

*Vierick v. United States*, 318 U. S. 241, 243, 244.

In the *Evans* case, *supra*, the Court concluded (333 U. S. 495):

"This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law."

The Supreme Court might well have added:

"A statutory offense cannot be established by implication and there can be no constructive offense. Before an accused can be punished, his act must plainly be within the statute." (*Arnold v. United States*, 115 F. 2d 526.)

**B. Even if Section 715 Had Been Validly Incorporated Into Section 697, the Acts Charged in the Indictment Are Not Made Punishable Offenses Against the United States.**

Standing alone, Section 697 of Title 38, U. S. C. A., neither creates an offense against the United States nor provides a penalty or punishment for any offense against the United States. Together with Sections 694, 694a and 694d of said Title, it relates to matters of a civil nature.

Standing alone, Section 715 of Title 38, U. S. C. A., does not include, or in any wise refer to, the acts charged in the indictment in this case.

By some hocus-pocus of interpretation counsel for appellee suggest reading into Section 715 what is not there; and then after that is done, to incorporate said Section, as revised and changed to suit their present needs, into Section 697.

Appellee's Brief shows the weakness of this position in the following language (p. 20):

“One difficulty raised in the present case is that Section 715 is limited on its face to claims for benefits under specific statutes, and this enumeration does not include the Servicemen's Readjustment Act of 1944, which was enacted eleven years later.”

It is also limited to specific offenses, for which punishment is provided. These do not include the offenses charged in the indictment.

On page 19 of Appellee's Brief there appears other language showing the weakness of appellee's position:

“. . . it should be noted that Section 715, standing by itself, states a crime definitely enough. In essence it states a crime *similar* to that outlined in Section 80 of Title 18 (1946 Ed.), *but limits the*

*crime to false statements concerning certain [entirely different and wholly unrelated] claims for benefits.”* (Italics ours.)

It is true that Section 715 “states a crime (or crimes) definitely enough.” But the crime stated or defined in Section 715 is not the offense charged in the indictment in this case.

There is an obvious hiatus between the crime or crimes defined and made punishable by Section 715 and the erroneously supposed crime charged in the indictment in the case at bar. This hiatus is not bridged or closed by Section 697, nor has appellee shown how it is or can be bridged or closed. Indeed, the Government offers nothing more than the suggestion that the Court read into Section 715 the provisions of an Act passed eleven years later, and then, as judicially amended and revised, make Section 715 apply to acts not previously included in or made punishable by said Section.

The criminal offenses defined and made punishable by Section 715 are the following:

- (1) Making, or causing to be made a false statement in an application for a veteran's pension (Sec. 701, Title 38, U. S. C. A.);
- (2) Making, or causing to be made, a false statement for the domiciliary care or hospital treatment of a veteran (Sec. 706);
- (3) Making, or causing to be made, a false statement for retired officer's disability pay (Sec. 710);
- (4) For receiving a veteran's pension, the right to which has ceased (Sec. 713); and
- (5) For receiving a veteran's pension without being entitled thereto (Sec. 714).

The five foregoing offenses are *all* of the offenses defined and made punishable by Section 715. If these five offenses are legally incorporated by reference into Section 697, nothing penal is thereby added to Section 715. Section 715 has never prohibited or penalized the acts charged in the indictment. Section 697 does not prohibit, and certainly does not penalize, the acts charged. For the acts charged there is no penalty in either of said Sections. The result is the same as if naught is added to naught: we still have naught.

Appellee contends that Congress clearly intended to make Section 715 apply to the Servicemen's Readjustment Act. This, we deny. But if Congress did so intend, that alone is insufficient; it must go further, and express such intent in clear and unequivocal language. This it has not done.

*Vierick v. United States*, 318 U. S. 236;  
*United States v. Evans*, 333 U. S. 483.

See, also cases cited in Opening Brief, page 14.

Federal statutory offenses are never implied. The federal decisions emphatically state that no act is punishable as a crime, unless it is plainly denounced and *made punishable by the plain and unambiguous language of a statute.*

*United States v. Resnick*, 299 U. S. 207;  
*Donnelley v. United States*, 276 U. S. 505;  
*Lanzetta v. New Jersey*, 306 U. S. 451;  
*First Nat'l Bk. v. United States*, 206 Fed. 374 (8 Cir.);  
*Arnold v. United States*, 115 F. 2d 523, 526;  
*United States v. Weitzel*, 246 U. S. 533, 543.

“To supply omissions (in a statute) transcends the judicial function.” (*Iselin v. United States*, 270 U. S. 245, 251.)

In *United States v. Evans*, 333 U. S. 483, *supra*, the defendant was indicted for concealing and harboring five aliens under Section 144 of Title 8, U. S. C. A. The District Court rendered judgment dismissing the indictment and the Supreme Court affirmed the judgment. The Government, as here, contended that Congress intended not only to denounce the acts mentioned but also to provide punishment therefor. Section 144 of Title 8, U. S. C. A., provides in part:

“That any person . . . who shall bring into or land in the United States (or shall attempt to do so) *or shall conceal or harbor*, in any place . . . any alien not duly admitted by an immigration inspector or not lawfully entitled to enter or to reside within the United States, under the terms of this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 and by imprisonment for a term not exceeding five years *for each and every alien so landed or brought in or attempted to be brought in.*” (Italics ours.)

The statute clearly denounces as an offense against the United States the concealing or harboring of an alien, as well as bringing or landing an alien within the United States. But, the penalty extends only to bringing or landing an alien within the United States. In respect to the contention of the Government that the Act clearly shows the intent of Congress to penalize the act of con-

cealing or harboring, the Supreme Court said (333 U. S. 485):

“Before discussing specifically the alternatives, we note that the Government rests primarily on the clarity with which Section 8 indicates Congress’ purpose to make concealing and harboring criminal rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty. Rather we are asked to make it effective by applying that one of the possibilities which seems most nearly to accord with the criminal proscription and the terms of the penalizing provision . . . .

“The position the Government asks us to take involves therefore a major task in two respects, not merely one. The first is to expand the penal language beyond the explicit limitation ‘for each and every alien so brought in,’ so as to apply the penalties designed for smuggling to all offenses covered by the section. The second is to do this blindly in reference to the scope and quality of the forbidden acts to which the extension is to be made . . . . We are not willing to undertake extension of the penalty provision blindfold, without knowledge in advance to what acts the penalties may be applied.” (*Id.* p. 490) . . . .

“This is a task outside the bounds of judicial interpretation.” (*Id.* p. 495.)

The *Evans* case, *supra*, was far more favorable to the Government than is the case at bar. There, the alleged offense was clearly denounced by the statute; here, it is not. There, the statutory proscription was clearly intended by Congress, as evidence by the words “shall be deemed guilty of a misdemeanor”; here, neither Section

715, nor Section 697, shows any intention to proscribe the act of causing the lender to make a false certificate or paper to the Veterans Administration. There, the penalty provided was held not to apply to the act of concealing or harboring an alien; here, neither Section 715, nor Section 697 prescribes or even remotely refers to a penalty for the act of causing the lender to make a false certificate or paper to the Veterans Administration.

In essence, the Government asks the Court to supply both proscription of the act here charged and punishment therefor. "That is essentially the sort of judgment legislatures rather than courts should make." (*United States v. Evans, supra*, p. 450.)

**C. The District Court Decisions Cited by Appellee Are Neither Persuasive nor Controlling in This Case.**

The Government cites only two cases on the point that Section 697 of Title 38, U. S. C. A., proscribes and penalizes the acts charged in the indictments in this case, namely, *United States v. Oakland*, 81 Fed. Supp. 343 (W. D., La.), and *United States v. Selph*, 82 Fed. Supp. 56 (S. D., Calif.).

With all possible deference to the two Judges who prepared the opinions in those cases, their opinions are neither persuasive nor controlling.

The decisions of District Courts, even though persuasive in their reasoning, are not binding on each other, much less upon Courts of Appeal.

*Northern Pac. R. Co. v. Sanders*, 47 Fed. 604, affirmed 166 U. S. 620;

*In re Madonia*, 32 Fed. Supp. 165;

*Fosgate Co. v. Kirkland*, 19 Fed. Supp. 152;

*Continental Securities Co. v. Interborough Rapid Tr. Co.*, 165 Fed. 945.

Comity does not extend further than that a decision by one District Judge should not be re-examined by another Judge in the same district. For cogent reasons, it may not even then be followed.

*Long v. Dick*, 38 Fed. Supp. 214;

*Continental Baking Co. v. Woodring*, 55 F. 2d 347, affirmed 286 U. S. 352.

In *United States v. Oakland*, *supra*, Judge Dawkins merely assumed that the penal provisions of Section 715 had been validly incorporated into Section 697. He then, without stating any reasons, said:

“It is not believed necessary to discuss . . . the question of the adoption of earlier statutes by subsequent acts of Congress. It suffices to say that I believe there can be no confusion or doubt about the applicability of the law in the manner stated in the present case.” (*Id.* p. 345.)

In the *Selph* case, Judge Yankwich said in his written opinion:

“Section 715 . . . punishes both him who knowingly makes or causes to be made, and him who aids or assists in, or procures the making or presentation of, the false or fraudulent statement or writing denounced. Section 697 makes the section applicable to claims under the Servicemen’s Readjustment Act of 1944 . . .”

There is no analysis of Section 715, nor of Section 697. Certainly, the acts charged in the indictments in this case are not denounced by Section 715, nor are they denounced by Section 697. This fact appears to be overlooked in both opinions in the above cases. Moreover, only by reading into the two sections something that Congress did not include in them could the Courts reach their respective conclusions. These are not binding here.

II.

**The Evidence Does Not Support the Verdict and Judgment.**

The Government's Brief states, in substance, that appellant caused the Bank of America to make false certificates to the Veterans Administration by means of double escrows, and that "their true purpose was to deceive." (Gov't Br. p. 29.) This statement is of the same pattern as another found at page 13, *i. e.*, "To be blunt, the crime is not overcharging, but lying." These statements are not supported by, but are contrary to, the evidence. It is both easy, and safe, for counsel to call a woman a liar; but they have miserably failed to back up the statement.

**A. Appellant Made No False Statements.**

Appellant told each veteran the exact price he was being charged for the lot sold him. No "lying" there. She delivered to the Pico-LaCienega Branch of the Bank of America two sets of escrow instructions in each sale, one of which plainly showed on its face the exact price paid by the veteran for the lot sold him. No "lying" to the Bank. Appellant made no statements to the Veterans Administration concerning any of the lots sold by her. No "lying" there. The Government has not told the Court of a single false statement made by appellant to a veteran, or to the Bank, or to the Government. Nevertheless it has the effrontery to brand her a liar.

**B. The Bank of America Was Not Deceived by Appellant; It Had Full Knowledge of the True Price Paid by Each Veteran for His Lot.**

The Government insists that appellant deceived the Bank as to the prices paid by veterans for the lots sold them by appellant. Nothing could be further from the truth. Nevertheless, it was able to incline both the jury and the trial court to this false view of the case. It is high time to expose the utter fallacy of the Government's contention.

The Government's own testimony shows the following pertinent facts: (1) that in each sale, except one, of a lot to a veteran two sets of escrow instructions were filed with the Bank; (2) *that one of said sets of instructions plainly showed the exact and true price paid by the veteran for his lot*; (3) that the Pico-LaCienega Branch of the Bank, where both sets of instructions were deposited and filed, forwarded only one of these sets of instructions to the Santa Monica Branch, and that the set so forwarded was not the one showing the exact and true price paid for the lot; and (4) that the Santa Monica Branch made the false certificate to the Veterans Administration.

At the trial the District Judge exposed the fallacy of the Government's contention that the Bank did not have knowledge of the exact and true prices paid for lots. He engaged Government counsel in a running colloquy, which, in part, is set out at pages 29-32 of Appellant's Opening Brief. There, as here, the Government argued in effect that, because the Pico-LaCienega Branch did not forward to the Santa Monica Branch the escrow instructions showing the exact and true price paid for each lot, therefore the Bank did not have knowledge thereof. At pages 28-29

of its brief the Government repeats this moth-eaten argument. In the colloquy referred to the following appears:

“Mr. Fitting: \* \* \* She rigged the transaction so that it would appear they fall within the law.

The Court: Appear to whom?

Mr. Fitting: So that the paper would come to the certifying branch, the Santa Monica Branch—

The Court: But, Mr. Fitting, you have to start with the assumption that the Bank is one entity and that everything an agent knows the Bank knows. \* \* \* So what the manager of the Pico-LaCienega Branch of the Bank of America knew, the Bank knew, did it not; and what the manager of the Santa Monica Branch knew, the Bank knew, did it not?

Mr. Fitting: Yes.

The Court: Now, you can argue practicalities, you can argue as a practical matter that it may not have known, but, as a matter of law, the law charges the bank with knowledge, doesn't it?

Mr. Fitting: That is right.” [R. p. 413.]

If, as the Government says, “these papers never reached the Santa Monica branch” (Gov’t Br. pp. 31-32), whose fault was it? There can be but one answer: it was the sole fault of the Pico-LaCienega Branch of the Bank. Is appellant to be convicted and sentenced because of the sole fault of the Bank? If so, a new doctrine must be read into the law. Such a doctrine, we submit, is monstrous.

The indictments in this case allege specifically that appellant caused the Bank to make false certificates that prices paid for lots did not exceed the reasonable (appraised) values thereof, “whereas, as defendant well knew

and *concealed* from said Bank and Veterans Administration" said prices did exceed such reasonable values. "Concealment" from the Bank was emphasized, over and over, at the trial; it was hammered home to the jury; it was argued extensively; it is now urged upon this Court; it is the chief reliance of the Government, without which no conviction could possibly be sustained.

But, appellant concealed *nothing* from the Bank. The exact and true price she charged and collected from each veteran for the lot sold him is shown by a duly signed and executed typewritten document filed with the Bank. Is appellant to be convicted and punished because the Bank ignored this documentary evidence?

The Government says that the true purpose of double escrows is to deceive. (Gov't Br. p. 29.) It may be remarked that double escrows are often used in consummating purchases of, or trades for, real property. *Per se*, they are neither illegal, nor improper. In many cases such escrows are absolutely necessary. To impute a fraudulent purpose to them would be to denounce a common and well recognized trade practice.

One thing more should be stated in this connection, *i.e.*, the Government's contention that appellant knew the amounts of the lot appraisals at the times she made respective sales thereof, and that she "rigged the transactions" accordingly. The contention is baseless, and contrary to the evidence.

The testimony of Robert E. Gilliland, appraiser for the Veterans Administration, shows that his appraisal of each lot sold by appellant to a veteran was made *after* the escrow instructions were deposited in the Bank of America. At that time the contract between appellant

and the veteran was, and for some days had been, executed. Mr. Gilliland testified [R. pp. 354-355]:

"In most cases, the bank, the loaning institution, would merely call up and say that the appraiser had been designated as the appraiser of that property (lot). However, at that particular time that was not the practice then. At that time the bank or the builder, either one, could call up any approved Veterans Administration appraiser and tell him they had some appraisal for. However, my authorization on all of these cases came through the Bank of America at Santa Monica."

The foregoing, and other evidence in the record, shows that each lot sold by appellant was appraised *after* the trade was closed between her and a veteran and *after* both sets of escrow instructions were deposited with the Pico-LaCienega Branch of the Bank of America. Just how appellant could know in advance of an appraisal and the amount thereof is not, and cannot be, explained by the Government.

The record in this case shows that the Bank of America had actual knowledge, or that it is legally chargeable with knowledge, of the exact and true amount paid by each of the veterans involved for the lot sold him.

The Government, however, tries to avoid the effect of the undisputed fact by saying (Gov't Br. p. 28):

"It was customary practice for the bank to base its certificate as to the lot price on the documentary evidence furnished it—*i.e.*, the escrow statements covering the lots forwarded to Santa Monica (Branch) by Pico-LaCienega (Branch)."

Apparently, the Government would have this Court believe that appellant had knowledge of the alleged practice of the Bank, and that in some way she manipulated the escrow instructions so that only one set thereof would be forwarded by the Pico-LaCienega Branch to the Santa Monica Branch, following which the latter would innocently make a false certificate to the Veterans Administration. This argument is so transparently thin as to be not even nebulous.

There is no evidence at all in the record that shows, or even tends to show, that appellant had any knowledge of the practice of the Bank, as between its Branches, in respect to handling escrows; and even less evidence, if possible, that appellant had anything to do with the alleged practice of the Pico-LaCienega Branch in forwarding only one of the two sets of escrow instructions to the Santa Monica Branch.

The Government would have this Court believe that appellant could, and did, manipulate the affairs of the Bank of America in respect to the business carried on by and between its Branches; and that by reason of the imagined manipulation appellant deceived and thereby caused the Santa Monica Branch to make false certificates to the Veterans Administration.

Who is responsible for the procedures and practices set up for the Bank and its Branches? Certainly not the appellant. To say that she could have the slightest influence in respect to such practices and procedures is pure nonsense.

If the Santa Monica Branch (the certifying Branch) of the Bank was deceived in respect to the prices paid by the veterans for their lots, who deceived it? One answer only is possible, *i. e.*, the Pico-LaCienega Branch, by failing to transmit the set of escrow instructions to the Santa Monica Branch showing the exact and true price paid by each veteran for his lot. Is appellant to be punished for the neglect and omissions of the Pico-LaCienega Branch? Or, otherwise put, is appellant to be punished for the deception practiced by the Pico-LaCienega Branch upon its sister Branch?

Government counsel appear to have forgotten their admissions in the running colloquy between them and the District Judge. Under the Court's searching questions, they were forced to admit (1) that they no longer questioned that the Bank knowingly made false certificates to the Veterans Administration [R. p. 418, lines 4-25], and (2) that the law charges the Bank with knowledge of what is done, or known, by each of its Branches [R. pp. 413-414]. These admissions followed the quaint but revealing statement of the District Judge that "The right hand has to know what the left hand is doing," and "The law requires that every man knows what both his hands are doing." [R. p. 409.]

III.

The Probationary Requirements of the Sentence Are Invalid.

The Court ordered appellant to pay sums aggregating \$4200 to, or for the account of, twelve persons because of offenses for which no convictions were had. The Court had no more authority to do this than to impose *fines* for offenses for which no convictions were had.

The Court's authority to place a defendant under sentence on probation, and limitations on such authority, must be found in statute. (*Trant v. United States*, 90 F. 2d 718, 719.)

The statute (18 U. S. C. A. Section 3651, formerly Section 724 of that Title) limits restitution or reparation "to aggrieved parties for actual damages or loss caused by the offense for which conviction was had." Two things must exist and concur before the Court may require restitution: (1) an aggrieved party must have suffered *actual* damages or loss; and (2) the defendant must have been convicted of an offense connected with such loss or damages.

**A. The Government Failed to Show That Any of the Seventeen Veterans Suffered Damages or Loss.**

Appellant was charged in the indictment with seventeen offenses. She was convicted of six thereof.

The record has not one word of evidence to show that any of the seventeen veterans suffered one cent of loss or damage by reason of their purchases of lots, or by reason of their respective investments in both lots and houses. Hence, one of the two statutory prerequisites is lacking as to each of said seventeen veterans.

**B. No Convictions Were Had for Eleven of the Seventeen Offenses Charged in the Indictment.**

The Court, either on motion of the Government or of appellant, dismissed eleven of the seventeen counts in the indictment. Therefore, no convictions were had in respect to the offenses charged in those eleven counts.

Thus, as to the eleven offenses mentioned, both statutory prerequisites to a valid order of restitution are lacking.

So far as we can ascertain, after diligent and extensive research, there is no reported decision squarely in point, due no doubt to the clarity of the statute.

In *United States v. Berger*, 145 F. 2d 888, cited at page 35 of the Government's Brief, the Court indicated approval of the view here expressed, saying at page 891:

“Clearly the court could make reparation for losses caused by the offense for which conviction was had a condition of probation *provided there were such losses.*” (Italics ours.)

In all respects the decision wholly fails to sustain the Government's contention here. The overtime wages involved in the *Berger* case, *supra*, were expressly held to constitute losses of the interested employees, and convictions were had.

In *United States v. Follette*, 32 Fed. Supp. 953 (Circuit Judge Maris presiding), also cited by the Government (p. 35), it was said, at page 954:

“The power of federal courts to suspend the execution of sentence and admit a defendant to probation is conferred by the federal probation Act. It will be seen from the last paragraph of section 1 of the act, 18 U. S. C. A., Section 724, that when restitution is made a condition of probation it may *only* be ordered

to be made to an ‘aggrieved party’ and ‘for actual damages or loss caused by the offense for which conviction was had.’ Although the first paragraph of the section authorizes the courts to place defendants on probation ‘upon such terms and conditions as they may deem best,’ I think it clear that this general language is limited by the later specific provision so far as restitution is concerned.”

The District Court erred in ordering restitution to any of the seventeen veterans, because no damages or loss were shown to have been sustained by any of them. The Court further erred in ordering restitution to eleven of said veterans, because no convictions were had for the offenses charged in respect to them. And the Court patently erred in ordering restitution to Stein who was not even mentioned in the indictment.

### Conclusion.

For the reasons stated in the Opening Brief and in this brief, the judgment of the District Court should be reversed.

Respectfully submitted,

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By JOHN W. PRESTON,

*Attorneys for Appellant.*

No. 12199

IN THE

**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

PETITION FOR REHEARING.

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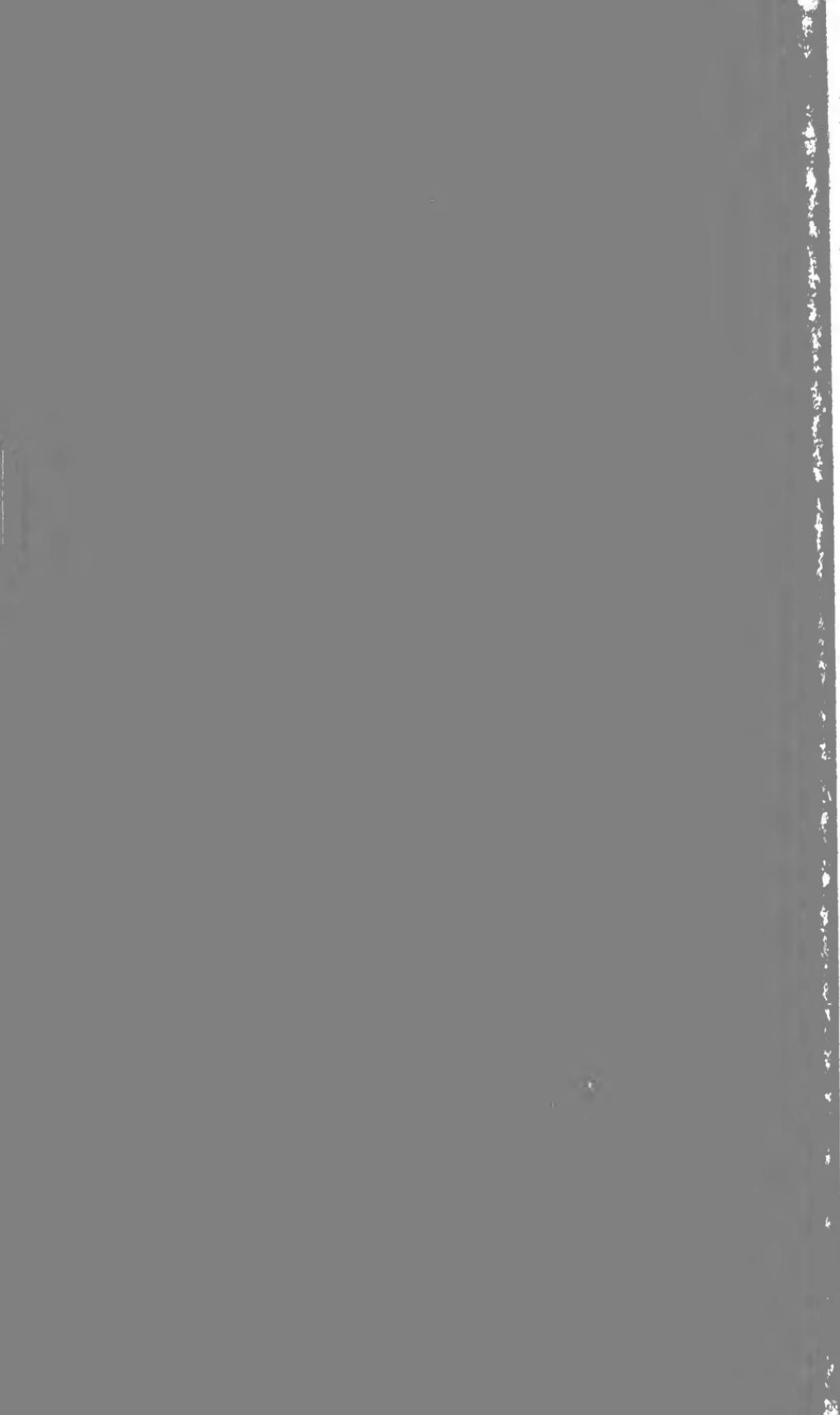
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APR 23 1958



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No. 12199

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

---

BARBARA KARRELL,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA,

*Appellee.*

---

## PETITION FOR REHEARING.

---

*To the Honorable United States Court of Appeals for the  
Ninth Circuit and the Judges Thereof:*

Comes now Barbara Karrell, appellant in the above entitled cause, and presents this her petition for a rehearing of said cause and for a reversal of the judgment for the reasons herein stated.

The record in this case plainly establishes the following propositions:

- (1) Appellant did not commit the offenses charged in the manner alleged in Counts 4, 6, 9, 11, 12 and 14 of the indictment;
- (2) Appellant did not commit any offense against the United States;
- (3) Appellant was convicted of some undesignated offense, and not as charged in the indictment;
- (4) There is no substantial evidence to support the judgment of conviction;

- (5) Appellant's conviction is the result of calculated prejudice and plain mass hysteria;
- (6) If any one was guilty of making, or causing to be made, false reports, it was the Bank of America and each veteran who signed, under criminal penalties, the application and report made to the Veterans' Administration;
- (7) There is not one word of evidence showing that appellant concealed the true prices paid to her for the lots involved from the Bank or from the veteran, or from the Veterans' Administration; and
- (8) There is no evidence at all that appellant caused the Bank and the veterans to make false reports to the Veterans' Administration.

The conviction in this case is without any factual support, and is a travesty on justice. Instead of prosecuting the veterans, who knowingly and deliberately signed and certified false statements, and the powerful Bank, which had actual documentary knowledge of the falsity of its reports and profited directly therefrom, the Government singled out a poor woman for prosecution who was under no duty to report to the Veterans Administration the price paid for a lot, and who did not even know that any such report was required to be made. The verdict of the jury, and the judgment thereon, holding that appellant concealed the prices paid for lots from and thereby caused the Bank to make false reports to the Veterans Administration are utterly absurd and would fall within the maxim *reductio ad absurdum* if it were not for the tragic fact that the verdict and judgment punish the innocent and allow the guilty to escape both prosecution and punish-

ment. We cannot believe that this Court will permit the unjust, and unjustified, verdict and judgment to stand when the plain and undisputed facts in evidence are further considered.

The decision of this Court rests, apparently, upon the following erroneous considerations (Opinion, p. 7):

- (1) That appellant initiated the escrow method used, first by the Bank and then by appellant;
- (2) That said method was used to deceive the Bank, and thereby to cause it to make false reports to the Veterans Administration;
- (3) That, while appellant may not have known exactly what the appraisal of each lot would be, "she knew something of its appraisal value";
- (4) That appellant wanted the Bank and veteran to make a false report to the Veterans Administration, presumably for their joint benefit; and
- (5) That "in some (wholly unexplained) manner (appellant) procured the Bank to cooperate in her scheme to accomplish this end."

With all possible respect due the Court, we assert that each and every reason mentioned by it for affirming the judgment is unsound, because the facts in evidence are squarely opposed thereto. Some of the vital facts overlooked by the Court are now stated.

In each of the loans, referred to in the Counts upon which appellant was convicted, the veteran and the Bank signed two completed forms, to-wit, an "Application for Home Loan Guaranty" and a "Home Loan Report" to the Veterans Administration.

The "Application for Home Loan Guaranty" provided for the following information, under Criminal penalties for fraud, etc.:

"1. The undersigned veteran applies to the undersigned lender for a loan for the purposes stated herein, and both apply to the Administrator of Veterans Affairs for guaranty of said loan . . .

"2. Purpose of the loan is . . .

"3. *Purchase price or cost* (is) \$..... Amount of Loan (is) \$....., Guaranty requested (is) \$..... . . . . . Signature of veteran

. . .

"9. All the information reflected by this application is true to the best of the lender's information and belief. .... Lender." (Veterans Benefits (1948 Supp.) page 90.)

The "Home Loan Report," in each instance, provided for signature by the veteran and lender, under penalties for fraud, and contained, *inter alia*, the following (Veterans Benefits (Pet. Supp.) pp. 96-97).

1. Amount of the loan, purpose, etc.
2. Certificate of lender, stating disbursements to the seller or contractor; existing liens; total *cost*; taxes; fire insurance; other insurance; fees, appraisal; fees, inspector; miscellaneous; total expenses, less cash or other credit and less primary loan; and amount of loan for guaranty or insurance. The certificate provides for statement of amount of escrow, and "That the price paid or to be paid by the veteran for such property or for the cost of construction, repairs, alterations or improvements does not exceed the reasonable value thereof as determined by proper appraisal dated ..... . . . made by .....

an appraiser designated by the Administrator (appraisal attached)." (*Id.*) This certificate is signed by the lender, and is likewise signed by the veteran. Since the appraisal report is filed with the above mentioned Application and Report, it is obvious that both lender and veteran knew that the appraisal values of the lot and improvements were less than the cost thereof. But this must be considered in connection with what is actually shown by the evidence in this case.

The following facts appear from Exhibits 11-A, 13-A, 15-A, 16-A, 17-A and 18-A on file herein, showing that appellant could not have known, at the time she prepared the escrow papers, what were, or would be the appraised values of the lots involved:

Count of Indictment	Name of Veteran	Date of Escrow	Date of Appraisal Report	Date of Report to V. A.	Exhibit No.
4	Philip Bentivegna	7-20-46	7-24-46	8-17-46	11-A
6	David Wilder	7-12-46	7-23-46	8-12-46	13-A
9	Fritz Kornfeld	6-17-46	7-11-46	8-12-46	15-A
11	John L. Chamberlain	6-25-46	7-10-46	8- 8-46	16-A
12	David Bruce Register	6- 5-46	7- 3-46	9-11-46	17-A
14	Louis Martin Higgins	5-19-46	5-29-46	7- 2-46	18-A

In each and every instance involved, the report of the appraiser on the value of the lot was made several days or weeks *after* the escrow papers were filed with the Bank. Since neither conspiracy nor connivance between the appraiser and appellant, or between the Bank and appellant is alleged, or proven, or even suggested, it is preposterous to assume that appellant did, or could, know at the time she filed the several escrow papers that the prices paid for the lots exceeded the appraised value thereof.

Additional pertinent facts, many if not all of them uncontroverted, will appear *infra*.

## ARGUMENT.

### I.

#### The Grounds Upon Which the Court Sustains the Conviction Are at Variance With the Allegations of the Indictment.

The indictment charges that appellant "did knowingly cause to be made a false certificate or paper . . . in that defendant did cause the Bank . . . Santa Monica California Branch to certify . . . that the price paid . . . for the purchase of a residential lot . . . did not exceed (the appraisal value) . . . whereas as defendant well knew and caused to be concealed from said bank and Veterans Administration the total price demanded and received . . . (therefor) did exceed the reasonable value thereof as determined by a proper appraisal." (Italics ours.)

The very essence of the offense charged in each count of the indictment is concealment by appellant from the Bank of the true price paid by each veteran for his lot. But, the escrow papers filed with the Bank completely refute this allegation of concealment. Moreover, this Court, doubtless recognizing the complete lack of evidence to show concealment from the Bank, said at page 7 of the Opinion:

"In the main the argument is that the proof clearly discloses that the lender was not deceived. *It is true that information furnished the bank through both branches constituted a full statement of the facts.*" (Italics ours.)

The allegation of concealment is not only the vital essence of each offense charged, but such concealment constitutes the actual means or method by which appellant

is alleged to have procured the Bank to make false reports to the Veterans Administration. Appellant was thus presented with the specific charge and issue that she caused the Bank to make false reports by concealing from it the prices paid by the veterans for their lots. Having presented the issue in that form, the Government must prove it as charged. Failure to so prove it constitutes a variance for which a reversal should be ordered.

It is well settled that where an indictment alleges the manner, or means, by which an offense is committed, the evidence must conform substantially to such allegations.

42 C. J. S. 1286, Sec. 262, Indictments and Informations, and cases cited in Notes 54-57;

31 C. J. 846, Sec. 460, and cases cited in Notes 79-81.

The rule is thus stated in 42 C. J. S. 1286:

“The part of the charge describing the manner of the offense must conform substantially to the evidence introduced to support it. Where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment. A material variance in descriptive matter is fatal, even though the description is unnecessarily particular. . . .”

The Government chose to charge appellant with causing a crime to be committed by concealment. When its charge of concealment failed to stand up, it then and there lost its case, or should have lost it, under the law applicable. Both the Government and this Court, however, fall back upon the inexplicable statement that since appellant desired a

false report to be made she "in *some* manner procured the bank to cooperate in her scheme to accomplish this end." (Italics ours.) (Op. p. 7.) Such a statement does not meet the ends of justice nor the requirements of the law.

It is uniformly held that where an offense may be committed in various ways, the evidence must establish it to have been committed in the mode charged in the indictment.

42 C. J. S. 1286, *supra*;

31 C. J. 846, *supra*;

*People v. Carson*, 155 Cal. 164;

*State v. Beckendorf*, 79 Utah 360, 10 P. 2d 1073, 1074;

*Fuller v. State*, 120 Tex. Crim. 66, 48 S. W. 2d 303, 304;

*Brown v. State*, 48 Ind. 38;

*State v. McConkey*, 20 Iowa 574;

*Commonwealth v. McCarthy*, 145 Mass. 575, 14 N. E. 643;

*Com. v. Hartwell*, 128 Mass. 415;

*Com. v. Richardson*, 126 Mass. 34, 30 Am. Rep. 647;

*Com. v. Moore*, 130 Mass. 45;

*Com. v. Bossidy*, 112 Mass. 277;

*State v. Young*, 163 Mo. App. 88, 138 S. W. 70;

*People v. Fulle*, 12 Abb. N. Cas. 196, 1 N. Y. Cr. 172;

*Com. v. Tobias*, 141 Mass. 129;

*Com. v. Luscomb*, 130 Mass. 42;

*Novy v. State*, 62 Tex. Crim. 492;

*Randle v. State*, 12 Tex. Crim. 492, 496, 138 S. W. 139;

*Kennedy v. State*, 9 Tex. App. 399;

*People v. Hubbard*, 141 Mich. 96, 104 N. W. 386;  
1 Greenleaf on Ev. Sec. 65.

In *Novy v. State*, 62 Tex. Crim. 492, the Court said:

“It has long been the established doctrine that, when an offense is charged to have been committed in one way, it is error for the Court, over the defendant’s objections, to authorize the jury to convict, if the evidence shows that he violated the statute in some other way not charged in the indictment or information.”

In the case at bar, no other way than by concealment is charged, or attempted to be proved. We have as an alternative to concealment, only the statement that “in some (unindicated) manner” appellant procured the Bank to make a false report.

In *State v. Young*, 163 Mo. App. 88, the Court said at page 98:

“When the state charges a violation in a particular way, it must be bound by the position it takes, and is not entitled to a verdict in its favor unless it makes proof of the particular charge which it has made. (Citing numerous cases.)”

In *Fuller v. State*, 120 Tex. Crim. 66, the Court said at page 67:

“The party charged with an offense is entitled to have, if an offense may be committed in various modes, that mode stated in the indictment which was

proven at the trial, and when one mode is stated and the proof of the commission of the offense by a different mode is offered, such evidence is incompetent by reason of variance."

It cannot be doubted that the offense of causing or procuring a lender to make a false report to the Veterans Administration may be committed in numerous ways, for example, by bribery, coercion, persuasion of a political or personal nature, or concealment of the facts. Other ways are also possible. So, this case comes squarely within the rule stated.

Moreover, it is settled law that all of the material allegations of an indictment must be proved *as charged*.

42 C. J. S. 1262;

*United States v. Johnson*, 123 F. 2d 111;

*Philyow v. United States*, 29 F. 2d 225;

*United States v. Summers*, 123 F. 2d 111.

And, where there is a material discrepancy between the averments and the proof, there is a variance.

42 C. J. S. 1273;

*Fox v. United States*, 45 F. 2d 364;

*Andrews v. United States*, 108 F. 2d 55;

*Meyers v. United States*, 3 F. 2d 379;

*Cf. Berger v. United States*, 295 U. S. 78, 55 S. Ct. 629.

Inasmuch as the indictment alleged the procuring of false reports by concealment, appellant was entitled to an acquittal unless that particular mode of procuring was established by the proof.

Other facts conclusively show: (1) That appellant did not initiate the escrow or other methods of handling the loan and reporting to the Veterans Administration; (2) that appellant knew nothing of the appraisal values of the lots until the indictment was returned against her; (3) that both the Bank and the builder of the houses instructed appellant how to make out the escrow instructions; (4) that appellant did not know that a report was required to be made by the Bank to the Veterans Administration; (5) that appellant was a mere broker, and received only a commission on each lot sale; and (6) that she neither procured, nor had any means of procuring, the Bank to make false reports.

## II.

**Since the Bank Had Full Knowledge of the True Price Paid for Each Lot Involved, Appellant Neither Concealed the True Price, nor Thereby Caused the Bank to Make a False Certificate to the Veterans Administration.**

In its opinion, at page 7, this Court said:

“It is true that information furnished the Bank through both branches constituted a full statement of the facts. But this is beside the point. The method used, *which was initiated and made possible by appellant*, was for the purpose of securing a false report to go to the Government and it was highly successful.” (Italics ours.)

**A. Appellant Did Not Initiate the Escrow Method Used.**

The last above quoted statement of the Court is not only a *non sequitur*, but is factually erroneous. The defendant testified without contradiction that prior to the sales here involved she was not familiar with the method

of handling escrows. [Rep. Tr. p. 455, lines 12-15.] She then testified as follows:

“A. The first house that I sold was where a veteran furnished his own lot, and we went to the Bank of America in Santa Monica *and the escrow department there made up the escrow instructions for me.*” [Rep. Tr. p. 455, lines 19-23.] (Italics ours.)

“Q. Just a moment. Do you remember who it was you talked to there? A. Well, I talked to two people there; first, the lady in charge of the department, a Mrs. Renschler, and then she turned me over, an hour or so later after the instructions were made up, to a gentleman.

Q. Do you remember his name? A. No; I don’t.

Q. Was he somebody in the escrow department? A. A regular employee, yes. *And she said, in handling any veterans' deals they wanted to recite the following which she had typed in the escrow instructions.*” [Rep. Tr. p. 456, lines 3-14.] (Italics ours.)

“Q. Do you have the escrow instruction which she gave you as a sample? A. No; I don’t have the escrow (instruction), but all of these are patterned after it, all the escrow instructions that I made up.” [Rep. Tr. p. 456, lines 20-24.]

The defendant’s testimony, *supra*, is uncontradicted. It shows that the head of the escrow department of the Santa Monica Branch of the Bank (the certifying Branch) “Initiated” the escrow method used by defendant and directed her to use such method, and that she did use it in accordance with the typed form supplied by Mrs. Renschler of the Bank.

The testimony above quoted does not justify this Court's statement (Op. p. 7) that "She desired a false report to go from the lending Bank to the Government officials who passed upon the loans and in some manner procured the Bank to cooperate in her scheme to accomplish this end." It is unreasonable, under the uncontradicted evidence, *supra*, to conclude that appellant either "initiated" the escrow method, or that "in some (unexplained) manner (she) procured the bank to cooperate in her scheme."

**B. Appellant Did Not Procure the Bank to Make False Reports to the Veterans Administration.**

This Court has, in reality, sustained defendant's conviction on the ground that, by concealing from the Bank and Veterans' Administration the true prices paid by the veterans for their respective lots, she procured or caused the Bank to make false reports to the Veterans Administration. This Court has said in this connection (Op. p. 7):

"She desired a false report to go from the lending bank to the Government officials who passed upon the loans *and in some (undisclosed) manner procured the bank to cooperate in her scheme to accomplish this end.*" (Italics ours.)

The Government, in the absence of proof, *assumed* that appellant desired a false report to be made concerning the true price paid for each lot. This Court has adopted the Government's assumption. But, where is the proof of any such desire? The record is challenged for support of any such assumption. If there is a single word of direct evidence to support the assumption, the Government has not cited, nor has Court referred to, it. The

only semblance of such evidence (and it does not sustain the assumption) is found on page 9 of the Government's Brief, where the defendant is quoted as testifying, as to the double escrows:

"Well, I don't remember the exact words I told him (the veteran Kornfield), but in substance it was the same as I had told all the rest of the G. I.'s; that we had to open two escrows and one of them was for the amount of the loan and the other was for the purchase price of the lot."

And in respect to the single escrow:

"Well, the same reason in this case as it was in the other one; some of them were two escrows and some of them were one, and in my assumption, the only thing that the bank should have been interested in was the amount of the loan, and not the amount that I was selling the lot for."

**C. Appellant Was Instructed by the Bank and the Builder of the Houses to Make Double Escrows.**

The factual background of the quoted testimony will show that the appellant was acting under instructions from the Bank and from the builder of the houses erected on the lots. Let us examine that background.

First, appellant was, in fact, a mere broker. She never had legal title to any of the lots. [Rep. Tr. p. 459.] Each lot was conveyed to the veteran by the true owner, Mr. Embricas [Rep. Tr. p. 457, lines 17-19; *id.* p. 459, lines 7-18], as shown by appellant's testimony [Rep. Tr. p. 459, lines 7-16], which is uncontradicted.

Second, the Bank instructed appellant to prepare the double escrow instructions in the manner followed by her.

[Rep. Tr. p. 456, lines 3-14 and 20-24, and p. 463, lines 4-10 *ante.*] ]

Third, the builder of the houses instructed defendant to make two escrows, in respect to which she testified as follows [Rep. Tr. p. 463, lines 13-25, and p. 464, lines 1-21]:

“A. . . . I had been instructed by the builder, too, to make two escrows, but I had gotten my escrow instruction furnished at the escrow department at Santa Monica, who told me to use this form that they had handed me in any future transaction. So when I started selling these lots I took the escrow instructions in to the Bank of America at Pico-LaCienega, *and the first ones they made up themselves.* Then when we had so many of them, I said, ‘Well, I can make them up to save the veterans’ time on it. They won’t have to take off work and they can come in in the evenings or Sunday afternoon and sign them.’ And that was the reason the escrow instructions were made up in my office.

Q. When you made the first sale of lots in that tract together with a contract to build houses on them, the escrow instructions were prepared by the officer or one of the employees in the escrow department of the Bank of America, is that correct? A. That is true.

Q. At Pico and LaCienega? A. They used the copy that I had submitted to them from the Santa Monica Bank.

Q. You took that copy to them? A. That is correct.

Q. Could you say approximately how many transactions you had where the bank themselves drew the

escrow instructions prior to the time that you took the forms over and typed them out in your office? A. Well, maybe three or four.

Q. Did any of those transactions involve two escrows? A. Yes.

Q. And where they involved the two escrows, both were drawn up by the escrow department of the Bank of America, is that correct? A. That is true." (Italics ours.)

Fourth, the defendant disclosed to the Bank the full price paid by each veteran where a single escrow instruction was prepared by her. She testified, without contradiction:

"Q. Let me ask you this: Do you remember who it was who handled those transactions? A. Yes.

Q. Who handled them? A. Ann Gage.

Q. She was an employee in the escrow department at the bank? A. Yes.

Q. Did you have a discussion with her in relation to those single escrows? A. Yes. . . .

Q. Give us the substance of the conversation you had. A. When I brought the escrows in, she said, 'Well, there is only one escrow covering this particular transaction.' And I said, 'Yes; but I received more than that, because, as you know, I paid more than that for the lots' [Rep. Tr. p. 492, lines 4-23] . . . and the bank knew what I had paid for the lots, because the original escrow was in the Pico-

LaCienega Bank and I had discussed that with both Mr. Shacklett (escrow officer) and the different girls in the bank, Miss Gage in particular. . . ." [Rep. Tr. p. 493, lines 3-7.]

"I had told them in each case, where they had a single escrow, that I had given the veteran a receipt for the money and which was either signed by myself or one of my sales people in the office, and that the escrow was for the amount of the loan which was to be paid out of the proceeds of the loan. It was the balance due from the loan." [Rep. Tr. p. 493, lines 15-20.]

Fifth, the appellant had no knowledge as to the appraised value of the several lots, or any of them, until she received the indictment in this case. She testified without contradiction:

"Q. Did you thereafter at any time receive any information as to the appraised value of that (the Weinstein) lot based on an appraisal made by an appraiser designated by the Veterans Administration?  
A. The first time I knew the appraisal was when I received the indictment.

Q. That is after the indictment had been returned against you here? A. That is true." [Rep. Tr. p. 467, lines 1-9.]

"Q. At the time you prepared those escrow instructions did you know that the Bank of America was required to issue any certificate to the Veterans Administration? A. No." [Rep. Tr. p. 467, lines 19-22.]

The evidence quoted is not contradicted, although the Government called Mr. Shacklett of the Pico-La Cienega Branch and Mr. Ryan of the Santa Monica Branch of the Bank to testify in its behalf.

The uncontradicted evidence above quoted establishes the following:

- (1) That appellant did not initiate the escrow method used.
- (2) The Bank initiated the escrow method used.
- (3) The Bank and also the builder of the houses required double escrows and directed the making thereof.
- (4) Where a single escrow was used, appellant told the Bank the exact price received for the lot.
- (5) The Bank had full knowledge, from the time that each escrow, whether double or single, was filed of the exact and true price paid to the defendant for each lot.
- (6) Appellant never knew, until the indictment was returned, the appraised value of any lot sold by her.
- (7) Appellant did not know that a certificate was required to be filed with the Veterans Administration.

In view of these facts, the judgment of the District Court is neither just nor understandable; and with proper deference to this Court, it has affirmed an unjust and unsupported judgment.

III.

**There Is No Substantial Evidence in the Record Showing That Appellant Caused the Bank to Make False Certificates to the Veterans Administration.**

Appellee has not cited any evidence other than alleged concealment showing that appellant procured the Bank to make false reports. This Court has said, only, that "there is substantial evidence in the record in support of the jury's verdict." (Op. p. 7.)

The Government's proof upon procurement was limited solely to trying to show concealment of actual prices paid for lots from the Bank. It failed dismally in that effort. There was not, nor could there possibly be, any concealment of prices paid when the escrow papers showed such prices.

If there was no concealment, then by what other means or method did appellant cause the Bank to make false reports as to the prices paid for lots? We do not know, nor could the jury know, nor can this Court know, from any evidence adduced, for the record on the point is as silent as the grave.

If appellant used any persuasion, pressure, fraud, deceit, or other means than the alleged but unproven concealment, the Government failed to show it, although it called as witnesses in its behalf various officers and employees of the Bank.

We respectfully assert that there is not one word of evidence, except in respect to the wholly unproven concealment, that shows that appellant caused or procured the Bank to make false certificates as to prices paid to her for lots.

Since the charge of concealment has utterly failed, and since there is no evidence at all that other means or methods were used by appellant to induce the Bank to make false reports, the question logically arises how can the jury's verdict be sustained?

In the total absence of substantial evidence to support the verdict and judgment, this Court has power to review the entire record and to reverse the judgment because not supported by substantial evidence.

Appellant's conviction does not rest upon any material or substantial facts placed in evidence, for such facts are wholly lacking. Instead, her conviction rests upon mere assumptions, improper inferences, and post war hysteria. None of these is recognized by law as a proper basis upon which to deprive an accused of liberty or property, and, especially, of a good name.

Appellant should not be branded as a criminal for life upon the flimsy and wholly unsubstantial evidence adduced by the Government in this case. Moreover, the evidence, such as it is, is at variance with the allegations of the indictment.

Wherefore, appellant prays that this Court grant a rehearing of this cause, and that the judgment of the District Court be reversed.

Respectfully submitted,

JOHN W. PRESTON,

JOHN W. PRESTON, JR.,

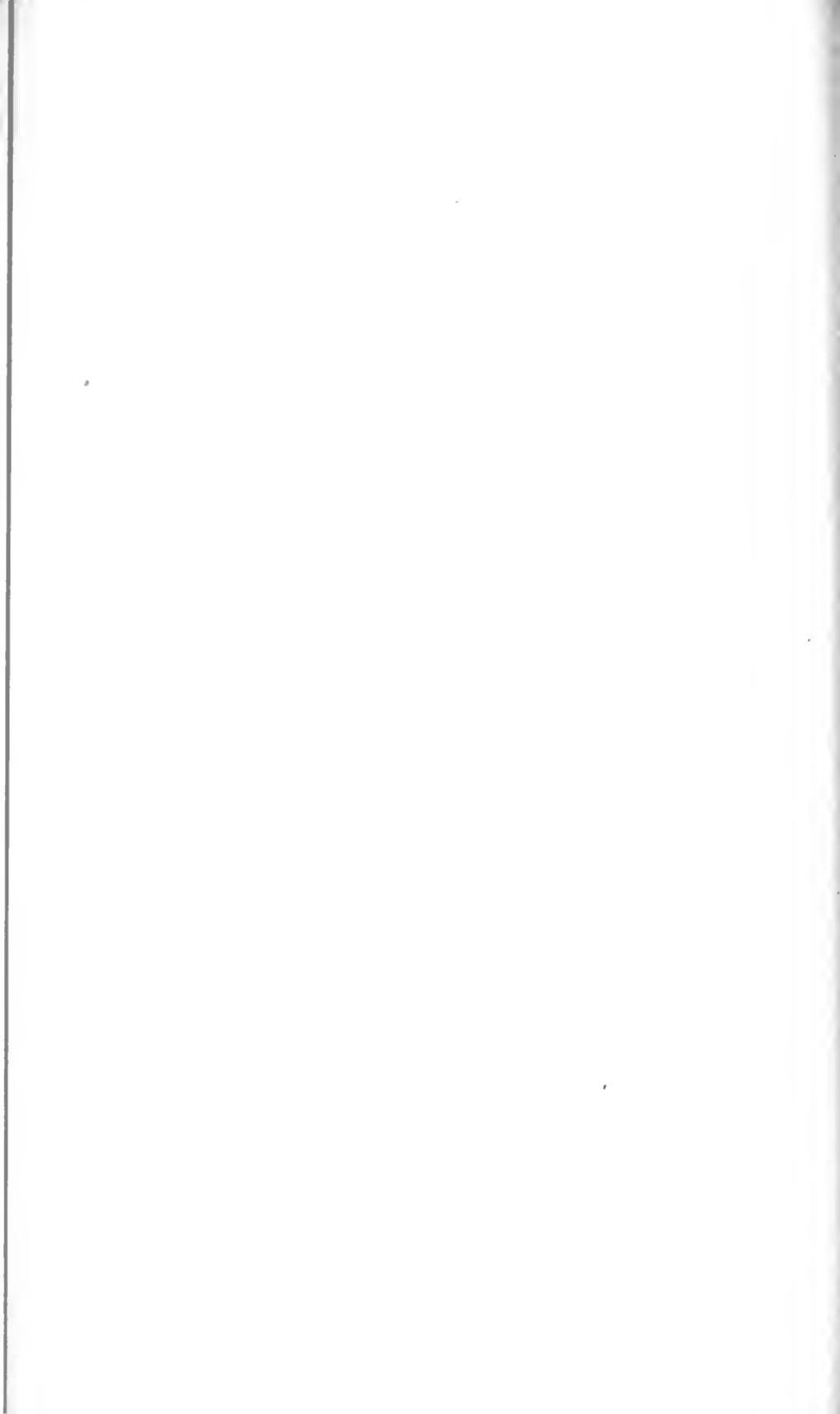
By JOHN W. PRESTON,

*Attorneys for Petitioner.*

**Certificate of Counsel.**

I, JOHN W. PRESTON, counsel for the above named petitioner, do hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for the purpose of delay.

JOHN W. PRESTON,







In the  
United States  
Circuit Court of Appeals  
for the Ninth Circuit

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In the Matter of the Application for a  
Writ of Habeas Corpus of BRUCE  
PIERCE,  
Appellant,

v.

TOM SMITH, Superintendent of the  
Washington State Penitentiary at  
Walla Walla, Washington,  
Appellee.

} No. 12201

APPEAL FROM THE UNITED STATES DISTRICT  
COURT FOR THE EASTERN DISTRICT OF  
WASHINGTON, SOUTHERN DIVISION

HONORABLE SAM M. DRIVER, JUDGE

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BRIEF OF APPELLEE

---

SMITH TROY,  
Attorney General of the  
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Attorneys for Appellee.

Office and Post Office Address: Temple of Justice, Olympia, Wash.



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**BRIEF OF APPELLEE**

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**COUNTERSTATEMENT OF THE CASE**

This matter is before the court on appeal from an order entered by the United States District Court for the Eastern District of Washington, Southern Division, the Honorable Sam M. Driver, Judge, dismissing appellant's application for a writ of habeas corpus. (Tr. 81.) The aforementioned order was entered following a hearing upon an order to show cause (Tr. 6), at which hearing appellant was allowed to go into the merits of his petition. (Tr. 16 to 52.)

Appellant was convicted by his plea of guilty before the superior court of the State of Washington for Yakima county, to the crime of Taking Indecent Liberties, a felony in the State of Washington. A judgment and sentence was entered by the aforementioned court on November 10, 1939, adjudging appellant guilty of the crime of Taking Indecent Liberties and ordering that he be punished by confinement in the state reformatory for a period of not more than twenty years (Tr. 75). Appellant was duly committed to the state reformatory at Monroe wherein he was confined until November 9, 1941, when he was granted a parole by the Board of Prison Terms and Paroles of the State of Washington. (Tr. 62.) This parole was subsequently revoked and appellant was reconfined in the reformatory (Tr. 66). On April 10, 1944, appellant was again granted a parole by the Board of Prison Terms and Paroles (Tr. 67), and was permitted to live in the State of Oregon under the supervision of the officials of that state. The last mentioned parole was, on November 23, 1945, revoked (Tr. 71), and appellant was transferred from the State of Oregon to the Washington State Reformatory where he was reconfined. Thereafter, the Board of Prison Terms and Paroles ordered that appellant be transferred from the reformatory to the state penitentiary at Walla Walla to serve the balance of his term. (Tr. 73.)

Following appellant's commitment to the Washington State Reformatory and immediately following the entry of the judgment and sentence of the Yakima county superior court the Board of Prison Terms and Paroles, pursuant to authority vested in them by law, fixed the "duration of confinement" of appellant at three years.

(Tr. 53.) Subsequent to the granting of the two paroles and revocations thereof and the transfer of appellant from the reformatory to the penitentiary, the Board of Prison Terms and Paroles again considered the matter of the duration of confinement of appellant and, having reached no conclusion, ordered that the case be continued "for the period of his full 20 year maximum sentence" (Tr. 74).

At the time of the revocation of appellant's second parole, when he was in the State of Oregon, his transfer to the State of Washington from that state was made under the authority of the Interstate Compact for the Supervision of Parolees and Probationers, which compact had been entered into by the states of Washington and Oregon on September 14, 1937, and was, at the time of transfer, then in effect (Tr. 79).

## ARGUMENT

The power of courts of the United States to grant writs of habeas corpus is restricted by section 2241 of Title 28 of the United States Code, and, because appellant is in custody pursuant to a judgment and sentence of a state court, the power of the court to grant the writ in this particular case depends upon there being a showing that he is in custody in violation of the constitution or laws or treaties of the United States. 28 U. S. C. § 2241 (c) (3). Neither in his petition nor in his brief in this court does appellant attack the validity of the judgment and sentence as rendered by the Yakima county superior court. At the hearing appellant conceded the regularity of the judgment and sentence. (Tr. 18.) It is valid when tested by the requirements for the validity for a judgment and sentence as set forth in the case of *In re Clark*, 24 Wn. (2d) 105, 110, 163 P. (2d) 577.

Petitioner's contentions, summarized, are that

- (1) He was improperly brought back from the State of Oregon into the State of Washington following the revocation of his second parole,
- (2) That he is illegally confined in the penitentiary when the judgment and sentence ordered his confinement in the reformatory, and
- (3) The Board of Prison Terms and Paroles "continued" the matter of re-setting the duration of his confinement following the revocation of the second parole.

The precise matters here raised have been litigated in an action between these identical parties in the courts of the State of Washington. The case of *Pierce v. Smith*, 131 Wash. Dec. 49, 195 P. (2d) 112 (cert. denied. U. S.

Supreme Court, October 11, 1948, 93 L. Ed. (Adv. Op.) 30, 69 S. Ct. 24) was an appeal from an order of the superior court for Yakima county denying on the merits an application for a writ of habeas corpus after a hearing pursuant to a show cause order. Because in its opinion in that case the Supreme Court of the State of Washington considered at length the same contentions which appellant has here raised, that opinion will be quoted from at length in this case and will be relied upon by respondent as his authority for the affirmance of the order of the district court.

First it must be stated that where the highest state court has reviewed on the merits an application for a writ of habeas corpus, considering federal questions and affording a full and fair adjudication, and the Supreme Court of the United States has denied certiorari, as is the situation in this matter (*Pierce v. Smith*, 131 Wash. Dec. 49, 195 P. (2d) 112; certiorari denied, October 11, 1948, 69 S. Ct. 24, 93 L. Ed. (Adv. Op.) 30; see also Tr. 19), a federal court will not ordinarily reexamine upon a writ of habeas corpus the questions thus adjudicated. *Ex parte Hawk*, 321 U. S. 114, 88 L. ed. 572, 64 S. Ct. 448; *House v. Mayo*, 324 U. S. 42, 89 L. ed. 739, 65 S. Ct. 517; *White v. Ragan*, 324 U. S. 760, 89 L. ed. 1348, 65 S. Ct. 978. Inasmuch as the courts of Washington permit inquiry by habeas corpus not only into the formal validity of the judgment but also into allegations of violations of rights guaranteed by the Constitutions of the United States and State of Washington (§ 3, chapter 256, Laws of Washington 1947; § 1075, Rem. Supp. 1947), which inquiry is equal to that permitted federal courts in habeas corpus review of state judgments, it is apparent that a full and

fair adjudication has been had and a reexamination by the district court was unnecessary.

Even assuming any or all of the above enumerated contentions of the petition to be true, would it follow that he is "in custody in violation of the Constitution or laws or treaties of the United States" upon which hinges the jurisdiction of the federal courts? We submit that it would not.

(1) While on his second parole appellant was permitted to reside in the State of Oregon and was placed subject to the supervision of the officials of that state. Following the determination by the Board of Prison Terms and Paroles of the State of Washington that appellant had violated the terms of his parole and the order of that board revoking his parole (Tr. 71), appellant was brought back to the State of Washington and reconfinement in the reformatory.

Concerning the proceedings had in the transfer of appellant from Oregon to Washington, the Washington Supreme Court said in *Pierce v. Smith, supra*, at page 53 as follows:

"Extradition proceedings were not necessary to effect the return of appellant to this state from the state of Oregon. The argument that appellant is being detained in this state for an offense for which he has never been tried is without merit.

"Authority to permit a parolee to reside in another state and to bring him again to this state upon revocation of parole is found in the 'Interstate Compact for the Supervision of Parolees and Probationers,' to which Oregon and this state became parties in 1937. The Congress of the United States consented to this interstate compact by an act which became effective, June 6, 1934. See 48 Stat. 909. Enabling legislation for Oregon is contained in Oregon laws of 1937, chapter 36, and for this state, in laws of 1937,

chapter 92, p. 379, Rem. Rev. Stat. (Sup.) § 10249-11 [P.P.C. § 783-1].

"The compact provides that the authorities of one state may permit any person released on parole to reside in any other state which is a party to the compact, if such person is a resident of the receiving state, or if the receiving state consents to receive him. Under the provisions of the compact, duly accredited officers of the sending state may, at all times, enter the receiving state and there apprehend and retake any person on probation or parole, and no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are waived on the part of states party to the compact as to such persons, and the decision of the sending state to retake a person on probation or parole, is conclusive upon and not reviewable within the receiving state.

"The challenge that the act is repugnant to Art. IV, § 2, clause 2, of the United States constitution, and to § 5278 of the revised statutes of the United States, 18 U. S. C. A. 662, providing for the extradition of fugitives from justice, and as being in violation of the fourteenth amendment to the United States constitution, in that it deprives one of liberty without due process of law, was considered in *In re Tenner*, 20 Cal. (2d) 670, 128 P. (2d) 338, and the compact was sustained. The court said:

"Nor does the act of the respondent deprive the petitioner of his liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution. He had his day in court when he was tried and convicted of a felony and sentenced to a maximum term of five years in the Washington State Penitentiary. The parole which he accepted was granted upon the express condition that the Board of Prison Terms and Paroles "may at any time within its discretion and without notice cause the parolee to be returned to the said institution to serve the full maximum sentence or any part thereof." One convicted of crime has the right to reject an offer of parole, but

once having elected to accept parole, the parolee is bound by the express terms of his conditional release. (*In re Peterson*, 14 Cal. (2d) 82 [92 P. (2d) 890].) . . .

"The existence of an independent method of securing the return of out-of-state parolees does not conflict with nor render ineffectual the federal laws with relation to extradition. The federal method of extradition is always present and may be invoked when necessary to secure the right to return of the fugitive to the demanding state. Also states not party to the interstate compact are free to invoke that procedure to secure the return of fugitive parolees. And if a state has elected to follow the federal procedure and claim the constitutional guarantee, the fugitive of course has the right to insist, on habeas corpus, that the procedure conform to the federal law. Similarly the parolee detained under the interstate compact has the right to complain, by means of habeas corpus, if that law is not complied with by the authorities. But no right exists on the part of the parolee, whose parole has been revoked, to claim that he may only be removed by the method of his choosing. And since the statute applies uniformly to all parolees from states party to the compact, the petitioner may not complain that the statute deprives him of the equal protection of the laws."

"Appellant's removal from Oregon was based upon a revocation of his parole, and his detention in the state penitentiary is based upon a judgment and sentence entered upon his plea of guilty to the crime of taking indecent liberties committed in Washington in 1939.

"The order revoking the parole of appellant is authorized by laws of 1935, chapter 114, § 4, p. 313, as amended by Laws of 1939, chapter 142, § 1, p. 422 (Rem. Rev. Stat. (Sup.), § 10249-4), which provides that the board of prison terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of

the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which such person was paroled, at the discretion of the board.

"A parole is not a right, but a privilege to be granted or withheld, as sound official discretion may impel. *State ex rel. Linden v. Bunge*, 192 Wash. 245, 73 P. (2d) 516. The revocation of parole is a matter which is left entirely to the discretion of the board. The procedure followed to revoke the parole of appellant and return him to this state was pursuant to statutory authorization."

It is respondent's contention that the proceedings had to return appellant to the State of Washington were entirely proper. The interstate compact entered into by the states of Washington and Oregon, introduced in evidence in this cause as Respondent's Exhibit 12 (Tr. 79), expressly provides for the removal of parolees between the above states without the necessity of extradition proceedings. The constitutionality of these compacts has been considered and upheld in the following cases: *Pierce v. Smith*, *supra*; *In re Tenner*, 20 Cal. (2d) 670, 128 P. (2d) 338; *Gulley v. Apple*, 213 Ark. 350, 210 S. W. (2d) 514; *Ex parte Casemento*, 24 N. J. Misc. 345, 49 A. (2d) 437.

In any event, the validity of the proceedings had in the transfer of appellant from the State of Oregon to Washington is a matter which would only be considered *at the time of the transfer* by an appropriate proceeding *then* had. It is well settled that once a state obtains jurisdiction, such jurisdiction is not lost by the fact that it was obtained by illegal means. The following general rule is stated preceding an annotation at 18 A. L. R. 509:

"Where a person accused of a crime is found within the territory of jurisdiction wherein he is so charged, the right to put him on trial for the offense charged is not impaired by the fact that he was brought from another jurisdiction by illegal means, such as kidnaping, unlawful force, fraud, or the like."

See also 22 Am. Jur., Extradition, § 65, where the above rule is again stated as being the holding of a majority of courts, including the federal courts. In the case of *Mahon v. Justice*, 127 U. S. 700, 32 L. ed. 283, 8 S. Ct. 1204, the reason for the rule is stated as follows:

"They all proceed upon the obvious ground that the offender against the law of the state is not relieved from liability because of personal injuries received from private parties, or because of indignities committed against another state. It would indeed be a strange conclusion, if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state."

Habeas corpus attacks the validity of the *present* confinement. Said confinement is pursuant to a valid judgment and sentence, and the manner of obtaining jurisdiction is not by this action reviewable.

(2) As to appellant's contention in his petition that his confinement in the *penitentiary* is improper inasmuch as the judgment and sentence ordered that he be confined in the *reformatory*, respondent is unable to perceive a federal question. For one who has been duly tried and convicted of the commission of a felony the manner of his custody as between a reformatory or penitentiary in the state is a matter peculiarly of state concern. Furthermore, although the judgment and sentence did order con-

inement in the state reformatory, section 5, chapter 114, Laws of Washington of 1935 (Rem. Rev. Stat. Supp. 10249-5), a statute in existence at the time the judgment and sentence in issue in this cause was rendered, provides:

“Whenever in its judgment the best interests of the state or the welfare of any prisoner confined in any penal institution will be better served by his or her transfer to another institution the board of prison terms and paroles is authorized to order and effect such transfer.”

It was pursuant to that authority that the order of transfer (Tr. 73) was entered, and that order was upheld by the Washington court in *Pierce v. Smith, supra*, at page 56.

(3) As to appellant's last contention in which he attacks the authority of the Board of Prison Terms and Paroles to reset the duration of his confinement (minimum sentence), the Washington Supreme Court in the *Pierce* case, *supra*, stated:

“The contention of appellant that, when the board of prison terms and paroles has once fixed the duration of a prisoner's sentence, the period thus fixed becomes the maximum term, and the board is without authority to alter that term or to authorize the prisoner's detention beyond the expiration date of such period, is without substantial merit.

“It is mandatory, under Laws of 1935, chapter 114, § 2, p. 309 (Rem. Rev. Stat. (Sup.), § 10249-2 [P.P.C. § 782-5]), upon the court to fix the maximum term of sentence only. Within six months after the admission of such convicted person to the penitentiary or reformatory, as the case may be, the board of prison terms and paroles ‘shall fix the duration of his or her confinement.’ The statute further provides that the term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which the person was convicted, or the maximum fixed by the court, where the law does not provide for a maximum term. Any convicted per-

son undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of § 2 of the cited statutes, shall, in accordance with the provisions of existing law,

“\* \* \* \* be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.”

“The statute (Laws of 1939, chapter 142, § 4, p. 422, Rem. Rev. Stat. (Sup.), § 10249-4 [P.P.C. § 786-1]) relating to release on parole of prisoners who have been sentenced to a term in the state penitentiary or reformatory, provides that

“\* \* \* \* no prisoner shall be released from the penitentiary or the reformatory unless, in the opinion of the Board of Prison, Terms and Paroles, his rehabilitation has been complete and he is a fit subject for release, or until his maximum term expires.”

“Manifestly, a person is not entitled to release from the state penitentiary or reformatory prior to the expiration of his maximum term, unless the board of prison terms and paroles is of the view that he has been rehabilitated.

“In *Lindsey v. Washington*, 301 U. S. 397, 81 L. Ed. 1182, 57 S. Ct. 797, the United States supreme court held that, under Laws of 1935, chapter 114, p. 308, the sentence of the defendant in this state for a period of fifteen years, was made mandatory by the statute; that the parole board was authorized to fix the duration of confinement within that period and to fix it anew within that period for infraction of the rules; and that, even if paroled, the prisoner would remain subject to surveillance, and, until the expiration of the fifteen years, his parole would be subject to revocation at the discretion of the board or the governor. The court stated:

“The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year

period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. . . .

"Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

"In *In re Grieve v. Smith*, 26 Wn. (2d) 156, 173 P. (2d) 168, we held that the right to a discharge from confinement of a prisoner serving a maximum sentence, is not a matter of right but is a matter of discretion with the board of prison terms and paroles.

"However designated, the 'duration of confinement' fixed by the board of prison terms and paroles is, in effect, a minimum term (*State v. Fairbanks*, 25 Wn. (2d) 686, 171 P. (2d) 845), and that board had supervision over appellant and may cause him to be detained in the penitentiary until the expiration of his maximum sentence of twenty years."

Respondent finds it difficult to add anything to the above excerpt from the opinion of the Washington court. As there stated the procedure followed by the state of Washington in setting sentences and determining terms of imprisonment has been upheld by the Supreme Court of the United States. *Lindsey v. Washington*, 301 U. S. 397, 81 L. ed. 1182, 57 S. Ct. 797. In the state of Washington one who has been convicted is liable to imprisonment for the

full maximum term, and earlier release upon parole is a matter lying within the discretion of the Board of Prison Terms and Paroles. The setting of the duration of confinement is merely a guide set by that body to determine when an inmate may be considered for parole. It is no more than a minimum sentence. *Pierce v. Smith, supra.* Furthermore, the "duration of confinement" may be increased by the Board of Prison Terms and Paroles where rule infractions have been committed, § 2, chapter 114, Laws of 1935 (Rem. Rev. Stat. (Sup.) 10249-2).

As stated by the Washington supreme court in the *Pierce* case, *supra*, parole is a privilege, and there is no right to release at any time prior to the expiration of the maximum sentence.

It follows, then, that habeas corpus does not lie on this ground because (a) the procedure followed does not violate the Constitution or laws or treaties of the United States, and (b) because the maximum term has not yet been served no right to immediate release would occur even should error or irregularity be shown on this point.

## CONCLUSION

Appellant was not entitled to issuance of the writ of habeas corpus from the lower court because he was not shown to be in custody in violation of the Constitution or laws or treaties of the United States. Since these same contentions have been considered and passed upon by the Washington Supreme Court, and the Supreme Court of the United States has denied *certiorari*, the lower court should have refused to consider the application. Concerning the merits of his contentions, it is too late to attack his transfer as a parole violator, but in any event it was regular, being in conformance with a compact entered into by the states of Washington and Oregon as approved by the Congress of the United States. The manner of appellant's custody, as between the reformatory and penitentiary, is solely of state concern. Inasmuch as appellant concedes the validity of the judgment and sentence adjudging him guilty of a felony and imposing a twenty year maximum term of confinement, and inasmuch as the maximum term has not yet expired and release prior to that time is not a right, appellant cannot here attack orders setting a duration of confinement less than the maximum term, and furthermore, such issue is not a question such as the Judicial Code allows consideration by federal courts in these matters.

Respectfully submitted,

SMITH TROY,

*Attorney General of the  
State of Washington,*

C. JOHN NEWLANDS,

*Assistant Attorney General,*

*Attorneys for Appellee.*



No. 12202

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United States  
Court of Appeals  
for the Ninth Circuit

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THOMAS J. HUGHES,  
Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a Corporation,  
Appellee.

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Transcript of Record

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Appeal from the United States District Court  
for the District of Arizona

APR 24 1949

PAUL P. O'BRIEN,  
CLERK



No. 12202

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United States  
Court of Appeals  
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THOMAS J. HUGHES,  
Appellant,

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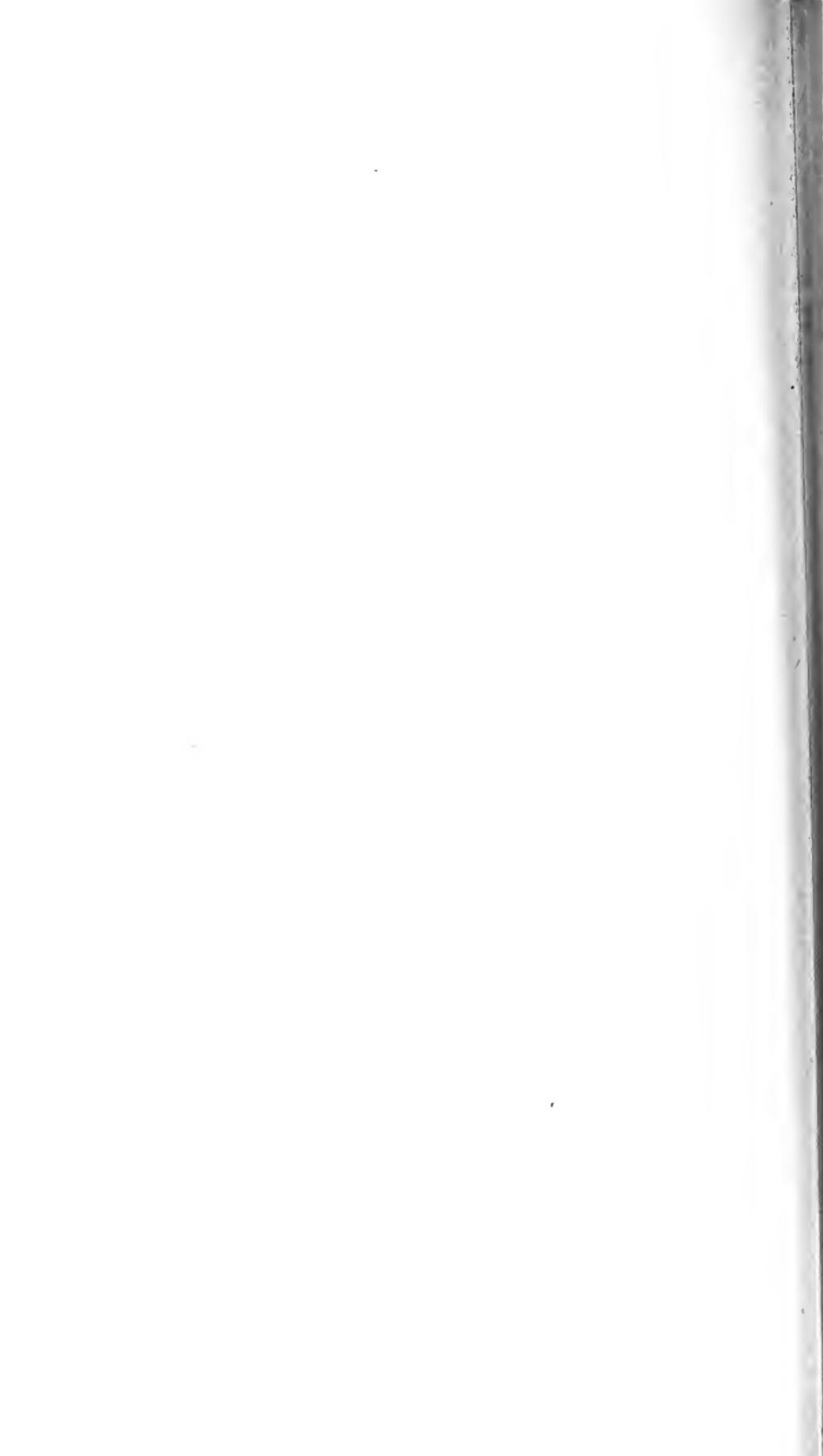
Transcript of Record

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Appeal from the United States District Court  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Phoenix, Arizona,  
For T. J. Hughes.

EVANS, HULL, KITCHEL, JENCKES & ROSS,

807 Title & Trust Bldg.,  
Phoenix, Arizona,  
For Mutual Life Insur. Co. of New York.

In the Superior Court of the State of Arizona  
in and for the County of Maricopa

No. 59766—Div. 1

THOMAS J. HUGHES,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a Corporation,

Defendant.

### COMPLAINT

Comes now the plaintiff in the above-entitled cause, Thomas J. Hughes, by his attorneys, Laney & Laney, and for cause of action against the defendant, The Mutual Life Insurance Company of New York, alleges as follows:

#### I.

That the plaintiff at all times mentioned herein has been, and now is a resident of the County of Maricopa, State of Arizona.

#### II.

That at all times mentioned herein the defendant has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and duly admitted, qualified and licensed to do, and doing, the business of life and health insurance in the State of Arizona.

### III.

That on or about the 30th day of June, 1923, plaintiff and the defendant entered into that certain contract of life and health insurance, a copy of which is hereto attached, marked Exhibit "A" and by reference made a part hereof.

### IV.

That the plaintiff has paid all of the premiums payable under the terms of said contract of insurance as the same became due, up to and until the occurrence of the disability hereinafter alleged, and has also paid under protest, as hereinafter more fully set out, certain other premiums demanded by the defendant.

### V.

That said contract of insurance provides, among other things, that if the plaintiff as the insured, after payment of premiums for at least one full year, shall, before attaining the age of sixty years, and provided all past due premiums have been duly paid and the said contract of insurance is in full force and effect, furnish due proof to the company, at its home office, that he has become totally and permanently disabled by bodily injury or disease so that he will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, the defendant, upon receipt and approval of such proof, will grant the following benefits;

#### "Benefits.

"1. Waiver of Premium.—The Company will,

during the continuance of such disability, waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the Company must be paid in accordance with the terms of the Policy, but if due after receipt of said due proof, will, if paid, be refunded upon approval of such proof.

“2. Income to Insured.—The Company will, during the continuance of such disability, pay to the Insured a monthly income at the rate of ten dollars for each one thousand dollars of the face amount of this Policy (but not including dividend additions), the first such monthly payment being due on receipt of said due proof and subsequent payments on the first day of each calendar month thereafter, if the Insured be then living and such disability still continue. No income payments, however, will be made prior to approval of such proof by the Company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due. \* \* \*. That said contract of insurance further provides as follows:

“Amendment Providing Additional Benefits in the Event of Total and Permanent Disability.

“The clause in this policy entitled ‘Benefits in the Event of Total and Permanent Disability before Age 60’ is hereby amended by the addition of the provisions set forth hereunder and in no other respect:

“1. Increased Income After 5 and 10 Years Continuous Disability.—If the insured become entitled

to the Disability Benefits specified in said clause, the monthly income per \$1000 of the face amount of this policy shall, if the disability be continuous, be increased from \$10, (a) to \$15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to \$20 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. \* \* \*”

## VI.

That in or about the month of February, 1935, and before the plaintiff had reached the age of sixty years, he became totally and permanently disabled by bodily injury and disease, so that he then was and would continue to be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation. That thereafter, and before the plaintiff had reached the age of sixty years and while said contract of insurance was in full force and effect and at a time after the plaintiff had paid the premiums called for in said contract of insurance for more than one full year, the plaintiff furnished due proof to the defendant Company at its home office that he had become totally and permanently disabled by bodily injury and dis-

ease so that he was and would be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit and from following any gainful occupation.

### VII.

That thereafter, and upon the receipt of said due proof, the defendant approved such proof and determined that the plaintiff had become totally and permanently disabled by bodily injury and disease so that he then was and would continue to be permanently, continuously and wholly prevented thereby from performing any work or for compensation, gain or profit and from following any gainful occupation.

### VIII.

That the plaintiff now is, and ever since the month of February, 1935, has been, and at all times in the future will be, continuously, totally and permanently disabled by bodily injury and disease from performing any work for compensation, gain or profit and from following any gainful occupation whatever. That the plaintiff has not at any time since he became so disabled in the month of February, 1935, so far recovered as to be able, temporarily or permanently, or at all, to perform any work or enter any occupation whatsoever for compensation, gain or profit.

### IX.

That by reason of the plaintiff having become and being so totally and permanently disabled, he became and now is entitled to have the payment of all premiums waived, which, if the plaintiff had

not become so totally and permanently disabled, would be or become due the defendant after the month of June, 1935, and became and is entitled to have paid to him on the first day of each and every month after the month of June, 1935, all monthly income or benefits provided to be paid him by the defendant under the terms of said contract of insurance, up to the present time and at all times in the future.

## X.

That after the defendant had so approved the aforesaid proof of the plaintiff's total and permanent disability, it waived all premium payments due after June, 1935, until the premium payment which, but for the plaintiff's aforesaid disability, would have been due under said contract of insurance on June 30, 1942. That shortly prior to June 30, 1942, the defendant, notwithstanding the plaintiff's aforesaid disability, demanded that the plaintiff pay the premium payment which would, but for the plaintiff's aforesaid disability, be due the defendant on June 30, 1942, and thereafter and in each of the years 1943, 1944, 1945, 1946 and 1947, said defendant likewise demanded that the plaintiff pay the premiums falling due on June 30 of each of said years, and in each of the aforesaid years advised plaintiff that if he did not so pay said annual premiums it would cancel his policy of insurance. That the prescribed amount of the annual premium for each of the aforesaid six years was the sum of \$228.02. That the plaintiff, because of the aforesaid

demands of the defendant and threats to cancel out his insurance policy, paid before the due dates thereof each and all of the annual premium payments in the amount of \$228.02 each for the aforesaid years of 1942 to 1947, inclusive; that in so paying said premium payments, the plaintiff paid each and all of the same under protest and demanded the immediate return of each and all thereof to him, upon the ground and for the reason that, because of the plaintiff's aforesaid disability, none of said premium payments were due the defendant, and the defendant was under obligation to waive payment of each and all of the same. That the plaintiff, upon paying each of said annual premium payments, was entitled, under the terms of said contract of insurance, to have and all of the same immediately repaid to him by the defendant. That the total amount of said annual premium payments so made under protest for said six years is the sum of \$1,368.12. That by virtue of the premises, the defendant is indebted to the plaintiff on account of said premium payments in the amount of \$1,368.12, together with interest at the rate of six per cent per annum on each of said annual premium payments from June 30th of the year in which each of the same was paid until said premium payments are repaid to the plaintiff. That the total amount of interest due on said premium payments, up to and including January 31, 1948, is the sum of \$253.08, thereby making a total of \$1621.20 as and for the aforesaid premium payments and interest due thereon from the defendant to the plaintiff, as of January 31, 1948.

## XI.

That after the defendant has so approved the aforesaid proof of the plaintiff's total and permanent disability, it started paying the plaintiff the monthly income or benefit payments as provided in said contract of insurance, commencing with the month of July, 1935, and continued to pay such monthly income or benefit payments on the first day of each month thereafter, up to and including the month of January, 1942. That the defendant, from and after the aforesaid January, 1942, payment, has at all times failed and refused to pay any further monthly income or benefit payments, and now refuses to pay any of said monthly income or benefit payments, or any part of the same. That under the terms of said contract of insurance, plaintiff became entitled to have paid to him on February 1, 1942, the sum of \$78.11 as a monthly income or benefit payment, and a like monthly income or benefit payment on the first day of each and every month thereafter until and including the month of June, 1945, and thereafter, under said contract of insurance, became entitled to have paid to him by the defendant the sum of \$104.14 on July 1, 1945, as a monthly income or benefit payment, and a like monthly income or benefit payment on the first day of each and every month thereafter. That the total amount due and owing the plaintiff from the defendant on account of principal of such unpaid monthly income or benefit payments, up to and including January 31, 1948, is the sum of \$6430.85. That the plaintiff is entitled to interest at the rate of

six per cent per annum on each and all of said monthly income or benefit payments from the date each became due until paid. That the total amount of interest on said monthly income or benefit payments due the plaintiff, up to and including January 31, 1948, is the sum of \$1090.92, thereby making a total of \$7521.77 due the plaintiff from the defendant on account of monthly income or benefit payments and interest due him up to and including January 31, 1948.

## XII.

That the plaintiff has done and performed all of the terms, conditions and covenants of said contract of insurance on his part to be kept and performed and, although the plaintiff has repeatedly demanded of the defendant that the defendant Insurance Company repay him the aforesaid premium payments paid by him under protest, and pay him the aforesaid income or monthly benefit payments to which he is entitled, said defendant has at all times failed and refused to pay any of said amounts, or any of the interest thereon.

Wherefore, the plaintiff prays the judgment of the court as follows:

1. That the plaintiff have and recover of and from the defendant Insurance Company, as and for principal and interest due him to January 31, 1948, the sum of \$9142.97, together with interest thereon at the rate of six per cent per annum from January 31, 1948, until paid.

2. That the plaintiff have and recover his costs herein incurred, together with such other and further relief as the court shall deem meet and proper in the premises.

LANEY & LANEY.

By GRANT LANEY,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 31, 1948.



ORDINARY LIFE  
WITH IN 100% PERMANENT DISABILITY BENEFITS (MONTHLY INCOME)  
DOUBLE INDEMNITY FOR DEATH BY ACCIDENT

have the right and opportunity to ex-

**Death of Beneficiary before Insuree.**  
—If any beneficiary die before the Insured, the

shall vest in the Insured, unless otherwise provided.

If the interest of a beneficiary shall have vested, if the right to change the beneficiary has been reserved, if there be no existing assignment of this Policy, may, while this Policy is in force, designate a new beneficiary reserving the right to change the beneficiary, by filing thereof at the Home Office of the Company accompanied by a suitable endorsement hereon. Such change shall take effect for suitable endorsement of the same on the Policy by the Company.

The right to change the beneficiary has — been reserved.

**Premiums.**—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable therunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

and to make an autopsy, unless prohibited by law.

**Participation:**

**Beneficiary**

**Annual Dividends.**—This Policy shall participate in the surplus of the Company and the proportion of the surplus accruing hereon shall be ascertained and distributed upon payment of the second year's premium and thereafter at the end of the second and of each subsequent policy-year.

At the option of the Insured each such dividend shall be either—

(1) Paid in cash; or,  
(2) Used toward the payment of any premium, if the above specified period of grace for such premium payment has not expired and if the remainder of the premium is duly paid; or,

(3) Applied to the purchase of a paid-up participating addition to this Policy (herein called dividend addition); or,

Left to accumulate to the credit of the Policy with compound interest at the rate of three per centum per annum participating in rest earnings each year (herein called dividend deposit). Dividends may be drawn on any anniversary of the date of the policy, or drawn, they shall be payable on the surrender, lapse or

otherwise within three months after any of a written notice requiring the election of one of the options, the dividends shall be applied to the purchase of paid-up additions under option (3). Such paid-up additions may be for a cash value which shall not be less than the cash value of paid-up additions under option (1), provided the reserve for such additions per option (1), applied to purchase continued insurance can be applied to the provisions of the clause "or Lapse".

Post-mortem, in the event of the death of the Insured a cash dividend will be created for the fraction, if any, of the then current policy-year else

TOTAL AND PERMANENT  
DISABILITY BENEFITS  
(Waiver of Premium and  
Double Indemnity for Death)

PREMIUMS PAYABLE  
DURING LIFE  
AMOUNT OF INSURANCE  
PAYABLE AT DEATH

ORDINARY LIFE  
DIS. AND D. I.  
GEN.

ANNUAL DISTRIBUTION  
OF SURPLIS



**have the right and opportunity**

**Death of Beneficiary before Insured:**

—If any beneficiary die before the Insured, the interest in the policy shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

The right to change the beneficiary has been reserved.

**Premiums.**—All premiums are payable in advance at said Home Office or to any agent of the Company upon delivery, on or before date due, of a receipt signed by the Treasurer of the Company and countersigned by said agent. A grace of thirty-one days shall be granted for the payment of every premium after the first, during which period of grace the insurance shall continue in force.

When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

**autopsy, unless prohibited by law.**

**Waiver:**

—**Waiver.**—This Policy shall participate in the surplus portion of the surplus accruing hereon shall payment of the second year's premium of each subsequent policy-year.

shall be either —

At the option of the Company:

(1) Paid in full.

(2) Used toward the payment of the

period of grace for such premium.

(3) Applied to the purchase of a paid-up addition to the Policy (herein called dividend addition); or,

(4) Left to accumulate to the credit of the Policy interest at the rate of three per centum per annum partly, excess interest earnings each year (herein called dividend deposit). Dividend deposits may be drawn on any anniversary of the date of the Policy; if not so drawn, they shall be payable on the surrender, lapse or maturity of the Policy.

Unless the Insured shall elect otherwise within three months after mailing by the Company of a written notice requiring the election of one of the four above options, the dividends shall be applied to the purchase of paid-up additions, as per option (3). Such paid-up additions may be surrendered at any time for a cash value which shall not be less than the original cash dividends as per option (1), provided the reserve for such paid-up additions has not been applied to purchase continued insurance or paid-up insurance in accordance with the provisions of the clause entitled "Options on Surrender or Lapse".

**Post-mortem Dividend.**—On the death of the Insured a cash dividend will be credited to this Policy for the fraction, if any, of the then current policy-year lapsing before such death.

ANNUAL DISTRIBUTION  
OF SURPLUS

DOUBLE INDEMNITY FOR  
DEATH BY ACCIDENT

TOTAL AND PERMANENT  
DISABILITY BENEFITS  
(Waiver of Premium and  
Income to Insured: Insurance

AMOUNT OF INSURANCE  
PAYABLE AT DEATH

ORDINARY LIFE  
DIS. AND D. I.  
GEN.



have the right and opportunity

**Death of Beneficiary before Insured:** — If any beneficiary die before the Insured, the interest

shall vest in the Insured, unless otherwise provided herein.

If the interest of a beneficiary shall have vested in the Insured, if there be no existing assignment of this Policy, may, from time to time, while this Policy is in force, designate a new beneficiary, with or without reserving the right to change the beneficiary, by filing written notice thereof at the Home Office of the Company accompanied by this Policy for suitable endorsement hereon. Such change shall take effect upon the endorsement of the same on the Policy by the Company.

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When this Policy shall become payable by the death of the Insured, any unpaid premium or premiums necessary to complete premium payments for the policy-year in which such death occurs (including the overdue premium, if death occurs within the period of grace) shall be deducted from the amount payable thereunder.

Except as herein provided the payment of a premium shall not maintain this Policy in force beyond the date when the next premium is payable. If any premium be not paid before the end of the period of grace, then this Policy shall immediately cease and become void, and all premiums previously paid shall be forfeited to the Company except as hereinafter provided.

marriage:

**Post-mortem Dividend.** — This Policy shall participate in the surplus portion of the surplus accruing hereon shall be either —

- At the option of the Insured, the specified period of grace for such premium payment of each subsequent policy-year.
- (1) Paid up.
  - (2) Used toward the payment of a premium.
  - (3) Applied to the purchase of a paid-up addition.
  - (4) Left to accumulate to the credit of the Policy at the rate of three per centum per annum partly interest at the rate of three per centum per annum partly excess interest earnings each year (herein called dividend deposits). Dividend deposits may be drawn on any anniversary of the date of the Policy; if not so drawn, they shall be payable on the surrender, lapse or maturity of the Policy.

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autopsy, unless prohibited by law.

ANNUAL DISTRIBUTION  
OF SURPLUS

DOUBLE INDEMNITY FOR  
DEATH BY ACCIDENT

TOTAL AND PERMANENT  
DISABILITY BENEFITS  
(Waiver of Premium and  
Income to Insured: Insured)

PREMIUMS PAYABLE  
DURING LIFE

AMOUNT OF INSURANCE  
PAYABLE AT DEATH

ORDINARY LIFE  
DIS. AND D. I.  
GEN.



This Policy and the value theretofore assigned to  
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK  
as sole security for a loan, the amount of which loan and  
of interest thereon or otherwise, an endowment arises against the  
policy. The Company agrees to pay to the beneficiary  
New York City JUN 18 1923  
THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK  
BY

J. C. H. Hughes  
Treasurer

JUN 18 1923

Annual Dividend  
**Ordinary Life Policy**  
With Total and Permanent Disability Benefits  
(Monthly Income)  
Double Indemnity for Death by Accident  
and  
No. 316838

The Mutual Life Insurance

Company of New York.

Insurance on the Life of

Thomas J. Hughes

Amount, \$ 5207.

Date, June 30th 1923

Term of Life.

Annual Premium, \$ 249.94

**Amendment Providing Additional Benefits in the Event of Total and Permanent Disability**

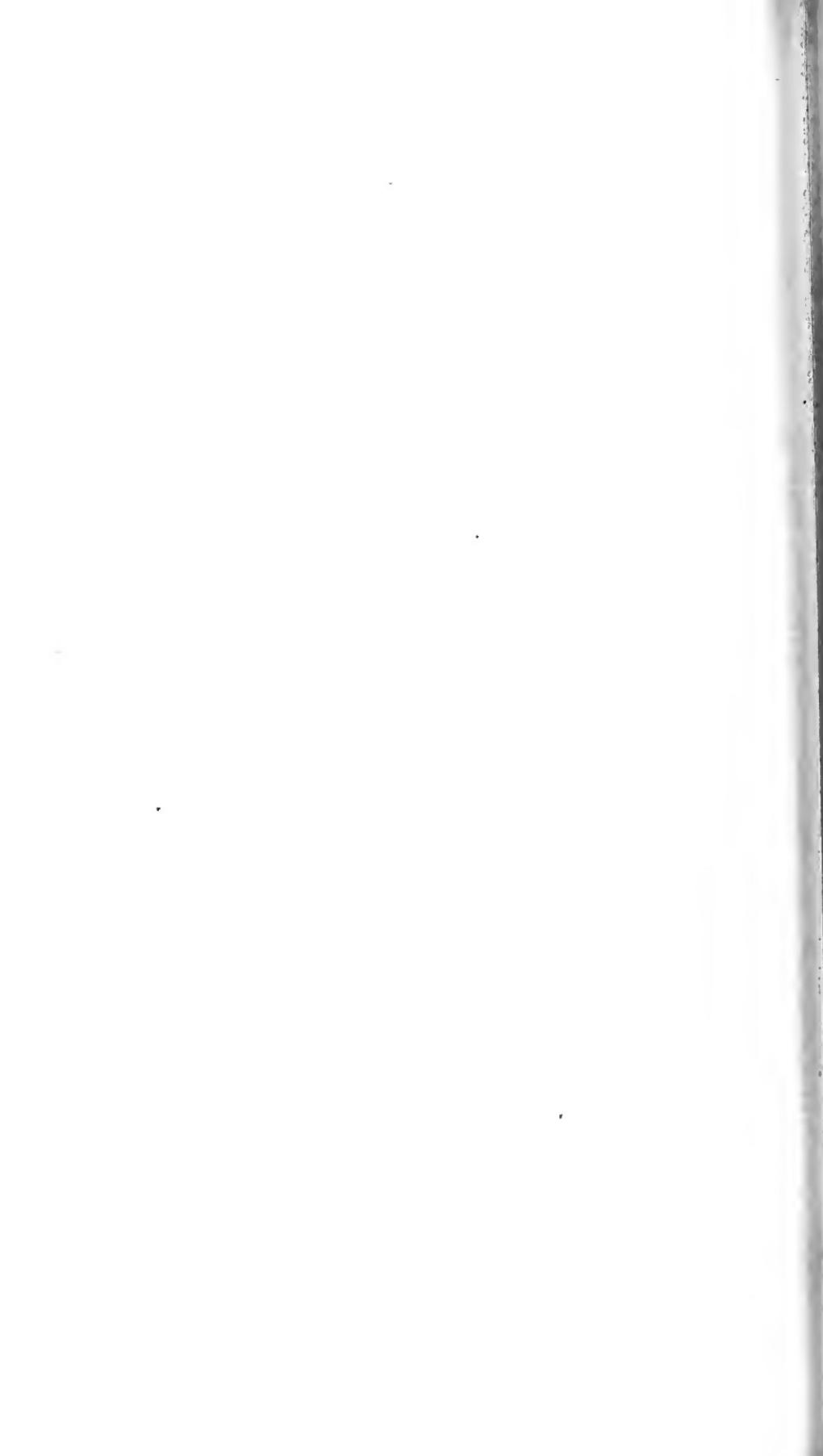
The clause in this policy entitled "Benefits in the Event of Total and Permanent Disability before Age 60" is hereby amended by the addition of the provisions set forth hereunder and in no other respects:

I. **Increased Income after 5 and 10 Years Continuous Disability.**—If the Insured become entitled to the Disability Benefits specified in said clause, the monthly income per \$1000 of the face amount of this policy shall, if the disability be continuous, be increased from \$10, (a) to \$15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to \$20 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. If the Insured shall so recover and shall subsequently become totally and permanently disabled, the monthly income payments during such subsequent disability shall commence at \$10 per \$1,000 of the face amount of this policy and shall each be of the same amount as if no such prior disability had existed.

II. **Disability Presumed Permanent after 90 Days Continuous Disability.**—If the Insured shall be totally disabled as defined in this policy for a continuous period of not less than ninety days, such disability shall, during its further continuance, be presumed to be permanent, but the Company shall have the right, anything in this policy to the contrary notwithstanding, to require proof of the continuance of such disability, during the first two years of such disability, at any time at which either a premium falls due or an income payment becomes payable, and after said two years, from time to time, but not oftener than once a year, as provided for in said clause in this policy.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK

William L. Simrell  
Secretary.



JUN 1938

2

(1) At what time or diagnosis?		200																																																						
<p>(a) In bed, what is the impairment?</p> <p>b) How much weight have you gained this year? <u>15</u></p> <p>(b) How much weight have you lost in the past year? <u>15</u></p> <p>c) If any change, state cause.</p> <p>d) Household has weight remained constant? <u>Yes</u></p> <p>e) Weight gain of <u>15</u> lbs. in a year age of <u>35</u> years, where, <u>Recently better</u></p>																																																								
<p>(a) How often and how recently?</p> <p>b) Have you been under any restriction of diet or any medical or other treatment or medical observation of any kind, within one year for any purpose? <u>No</u></p> <p>c) Have you ever changed your residence on account of your health? <u>No</u></p> <p>d) Do you consume alcohol or drug tablets? <u>No</u></p> <p>e) Has any member of your household suffered from tuberculosis or consumptive disease during the past year? <u>No</u></p> <p>f) Has there ever been any suspicion that any of your parents, brothers or sisters ever suffered from tuberculosis or consumption, cancer, epilepsy, paralysis or apoplexy? <u>No</u></p>																																																								
<p>27. Family record of disease</p> <table border="1"> <thead> <tr> <th>Age</th> <th>Condition of health</th> <th>Age</th> <th>Condition of health</th> <th>Age</th> <th>Condition of health</th> </tr> </thead> <tbody> <tr> <td>Father</td> <td><u>Dead</u></td> <td>Father</td> <td><u>Dead</u></td> <td>Father's Father</td> <td><u>Dead</u></td> </tr> <tr> <td>Mother</td> <td><u>Dead</u></td> <td>Mother</td> <td><u>Dead</u></td> <td>Father's Mother</td> <td><u>Dead</u></td> </tr> <tr> <td>How many? 1</td> </tr> <tr> <td>Brothers</td> <td>—</td> <td>Sisters</td> <td>—</td> <td>Brothers</td> <td>—</td> </tr> <tr> <td>(If same living, no more)</td> <td></td> <td>(If same living, no more)</td> <td></td> <td>(If same living, no more)</td> <td></td> </tr> <tr> <td>How many? 3</td> </tr> <tr> <td>Daughters</td> <td>—</td> <td>Sons</td> <td>—</td> <td>Daughters</td> <td>—</td> </tr> <tr> <td>(If same living, no more)</td> <td></td> <td>(If same living, no more)</td> <td></td> <td>(If same living, no more)</td> <td></td> </tr> </tbody> </table> <p>I certify that the above statements are fully and correctly made.</p> <p>State or Province of <u>Alaska</u> on <u>22</u> day of <u>July</u> <u>1938</u>.</p> <p>I declare that the above were read by me and understood.</p> <p><u>J. L. Hause</u></p>			Age	Condition of health	Age	Condition of health	Age	Condition of health	Father	<u>Dead</u>	Father	<u>Dead</u>	Father's Father	<u>Dead</u>	Mother	<u>Dead</u>	Mother	<u>Dead</u>	Father's Mother	<u>Dead</u>	How many? 1	Brothers	—	Sisters	—	Brothers	—	(If same living, no more)		(If same living, no more)		(If same living, no more)		How many? 3	Daughters	—	Sons	—	Daughters	—	(If same living, no more)		(If same living, no more)		(If same living, no more)											
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[Title of Superior Court and Cause.]

SUMMONS

The State of Arizona to the above-named defendant, The Mutual Life Insurance Company of New York, a corporation,

You Are Hereby Summoned and required to appear and defend in the above-entitled action in the above-entitled court, within Twenty Days, exclusive of the day of service, after service of this summons upon you if served within the State of Arizona, or within Thirty Days, exclusive of the day of service, if served without the State of Arizona, and you are hereby notified that in case you fail so to do, judgment by default will be rendered against you for the relief demanded in the complaint.

The names and addresses of plaintiff's attorneys are Laney & Laney, 610 Luhrs Tower, Phoenix, Arizona.

Given under my hand and the seal of the Superior Court of the State of Arizona in and for the County of Maricopa, this 31st day of January, 1948.

[Seal]

WALTER S. WILSON,  
Clerk.

By CLIFFORD H. WARD,  
Deputy Clerk.

State of Arizona,  
County of Maricopa—ss.

I Hereby Certify that I received the within Summons on the 31st day of January, A.D. 1948, at the hour 12:45 p.m., and personally served the same on the 2nd day of February, A.D. 1948, The Mutual Life Insurance Company of New York, a corporation, being the said defendant named in said Summons, by leaving in the office of the Arizona Corporation Commission, during office hours, County of Maricopa, two copies of said Summons, to which was attached a true copy of the complaint mentioned in said Summons.

Dated this 2nd day of February, A.D. 1948.

Fees, Service, \$1.50; Travel, 2 miles, \$.60; Total, \$2.10.

By L. C. BOIES,  
Sheriff.

W. R. YOUNG,  
Deputy Sheriff.

[Endorsed]: Filed Feb. 7, 1948.

[Title of Superior Court and Cause.]

NOTICE OF APPLICATION FOR  
REMOVAL

To Thomas J. Hughes, plaintiff, and to Laney & Laney, his attorneys:

Please Take Notice that defendant will, on the 21st day of February, 1948, at or about 9:15 o'clock, a.m., file in the above-designated court, and in the office of the clerk thereof, its petition and bond for the removal of the above-entitled and numbered suit to the District Court of the United States, for the District of Arizona, and will, immediately thereafter, or as soon as counsel can be heard, call up said petition and bond for hearing and disposition before said court, in Division No. 1.

Copies of said petition and bond are served upon you herewith.

Dated this 20th day of February, 1948.

EVANS, HULL, KITCHEL,  
JENCKES & ROSS.

By /s/ NORMAL S. HULL,  
Attorneys for Defendant.

Copy received this 20th day of February, 1948.

LANEY & LANEY.  
By GRANT LANEY,  
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

PETITION FOR REMOVAL OF SUIT TO THE  
DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF ARI-  
ZONA

To the Honorable The Superior Court of the State of Arizona, in and for the County of Maricopa:

The petition of defendant The Mutual Life Insurance Company of New York, hereinafter called "petitioner," respectfully shows:

I.

This is a suit of civil nature at law, brought by Thomas J. Hughes, as plaintiff, against petitioner, as sole defendant, to recover disability benefits in the aggregate amount of \$9,167.45, under a policy of ordinary life insurance, No. 3168638, including total and permanent disability benefits, issued by petitioner to plaintiff on July 7, 1925.

II.

The amount in controversy, at the time of commencement of this suit exceeded, and now exceeds, the sum of \$3,000.00 exclusive of interest and costs.

III.

Plaintiff was, at the time of commencement of this action, and now is, a citizen and resident of the State of Arizona, and petitioner was, at the com-

mencement of this action, and now is, a corporation duly organized and existing under and by virtue of the laws of the State of New York, and a citizen and resident of the State of New York.

#### IV.

The time within which petitioner is required to move, answer, plead or otherwise appear herein has not expired, and petitioner has not moved, answered, pleaded or otherwise appeared herein.

#### V.

By reason of the matters and things aforesaid, this is a suit of which the district courts of the United States are given original jurisdiction, and is removable to the District Court of the United States, for the District of Arizona.

#### VI.

Petitioner appears herein specially and solely to remove this suit to the District Court aforesaid on the grounds herein asserted, and petitioner presents herewith a bond, with good and sufficient surety, that petitioner will enter in said District Court within thirty days from the date of filing this petition, a certified copy of the record in this suit and for the payment of all costs which may be awarded by said District Court if said District Court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioner prays that this Honorable Court proceed no further herein, except to make an order of removal and to accept said bond, and to

cause the record herein to be removed into the District Court of the United States, for the District of Arizona.

Dated this 20th day of February, 1948.

EVANS, HULL, KITCHEL,  
JENCKES & ROSS.

By /s/ NORMAL S. HULL,  
Attorneys for Petitioner.

State of Arizona,  
County of Maricopa—ss.

Norman S. Hull, being duly sworn, deposes and says that he is one of the attorneys for The Mutual Life Insurance Company of New York, the petitioner in the foregoing petition; that he makes this affidavit for and in behalf of said petitioner, and that he has read said petition, and that the allegations thereof are true.

/s/ NORMAN S. HULL.

Subscribed and sworn to before me this 20th day of February, 1948.

[Seal] DORA DENNEY,  
Notary Public.

My commission expires: November 14, 1951.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

### REMOVAL BOND

Know All Men by These Presents:

That United States Guarantee Company of New York, a corporation duly authorized to engage in a general indemnity and surety business within the State of Arizona, is held and firmly bound unto Thomas J. Hughes, plaintiff in the above-designated and numbered cause, his successors and assigns, in the penal sum of Five Hundred Dollars (\$500) lawful money of the United States of America, for the payment of which well and truly to be made, it binds itself, its representatives, successors and assigns, by these present.

The condition of this obligation is that

Whereas, The Mutual Life Insurance Company of New York, a corporation, the defendant above named, is about to petition the Superior Court of the State of Arizona, in and for the County of Maricopa, for the removal of the above-entitled and numbered cause, therein pending, from said Court of New York, a corporation, the defendant above to the District Court of the United States, for the District of Arizona.

Now, Therefore, if the said Mutual Life Insurance Company of New York, a corporation, defendant, shall enter in said District Court of the United States, for the District of Arizona, within thirty (30) days from the date of filing its petition for removal, a certified copy of the record in said suit, and shall pay all costs that may be awarded by the said District Court of the United States, for

the District of Arizona, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, United States Guarantee Company of New York has caused this removal bond to be executed by its duly authorized attorney-in-fact at Phoenix, Arizona, this 20th day of February, 1948.

UNITED STATES GUARANTY COMPANY OF  
NEW YORK.

[Seal] By DEE LATIMER,  
Attorney-in-Fact.

State of Arizona,  
County of Maricopa—ss:

This instrument was acknowledged before me this 20th day of February, 1948, by Dee Latimer, as attorney-in-fact for United States Guarantee Company of New York, a corporation, who personally appeared before me and stated that he executed the same as such attorney-in-fact, being thereunto duly authorized.

[Seal] GRACE L. PERRY,  
Notary Public.

My Commission Expires September 4, 1950.

The above Bond was duly approved by me this 21st day of February, 1948.

M. T. PHELPS,  
Judge.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

ORDER FOR REMOVAL OF SUIT TO THE  
DISTRICT COURT OF THE UNITED  
STATES FOR THE DISTRICT OF ARI-  
ZONA

This cause came on regularly to be heard on the petition of defendant, The Mutual Life Insurance Company of New York, for an order of removal, accompanied by proper bond, and it appearing that this is a proper case for removal, it is

Ordered, Adjudged and Decreed that:

(1) The removal bond be, and the same hereby is approved and accepted;

(2) This cause be, and the same hereby is, removed to the District Court of the United States, for the District of Arizona;

(3) The clerk be, and he hereby is, directed to prepare the record in this cause for removal;

(4) All other proceedings of this Court be, and the same hereby are, stayed.

Done in open Court this 21st day of February, 1948.

M. T. PHELPS,  
Judge.

[Endorsed]: Filed Feb. 21, 1948.

[Title of Superior Court and Cause.]

Division No. 1

Court convened at 9:30 a.m. Saturday, February 21, 1948. Present: M. T. Phelps, Judge; Walter S. Wilson, Clerk; The Sheriff; the County Attorney; and the Court Reporter.

Comes now Evans, Hull, Kitchel, Jenckes & Ross, appearing as counsel on behalf of the Defendant.

A hearing is had on the Petition for Removal of this case to the United States District Court for the District of Arizona.

It is ordered for removal of the above-entitled case to the District Court of the United States for the District of Arizona and bond is fixed in the sum of \$500.00.

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[Title of Superior Court and Cause.]

State of Arizona,  
County of Maricopa—ss.

I, Walter S. Wilson, Clerk of the Superior Court of Maricopa County, State of Arizona, hereby certify the foregoing to be a full, true and correct copy of the record, and the whole thereof, in the above-entitled cause heretofore pending in the Superior Court of Maricopa County, Arizona, being cause No. 59766 wherein Thomas J. Hughes was Plaintiff and The Mutual Life Insurance Company of New York, a corporation, was Defendant, said record consisting of: Complaint, filed January 31, 1948; Summons and Return, filed February 7, 1948; Notice, filed February 21, 1948; Petition, filed Feb-

ruary 21, 1948; Removal Bond, filed February 21, 1948; Order, filed February 21, 1948; and Minute Entry of February 21, 1948, granting Defendant's motion for removal all as appears in the files and or record in my office.

Attest my hand and Seal of said Court at Phoenix, County of Maricopa, State of Arizona, this 10th day of March, 1948.

[Seal]      /s/ WALTER S. WILSON,  
Clerk of the Superior Court,  
Maricopa County, Arizona.

[Endorsed]: Filed March 20, 1948.

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In the District Court of the United States  
for the District of Arizona

No. Civ. 1153—Phx.

THOMAS J. HUGHES,  
Plaintiff,  
vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a Corporation,  
Defendant.

**AMENDED ANSWER**

Defendant answers the complaint, as follows:

**I.**

Admits the allegations of paragraphs I and II.

**II.**

Admits that, on or about June 30, 1923, the parties hereto entered into a certain contract or pol-

icy of Ordinary Life insurance, a copy of which is annexed as Exhibit A to the complaint.

### III.

Admits that plaintiff has paid premiums and has otherwise complied with the provisions of the policy to the extent that the policy is in force and effect, but denies each and every other allegation contained in paragraphs IV and XII.

### IV.

Admits that the policy, subject to provisions, conditions and limitations therein stated, insured plaintiff against permanent and total disability as therein defined, and that some of the language and provisions of the policy are alleged in paragraph V. Alleges that the policy also provides, amongst other things, as follows:

“Proof of Continuance of Disability Required; Recovery From Disability.—Although the proof of total and permanent disability may have been accepted by the Company as satisfactory, the Insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the Company due proof of the continuance of such disability, and if the Insured shall fail to furnish such proof, or if it shall appear to the Company, except in the case of the ‘Specified Disabilities’ mentioned above, that the Insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further

premium shall be waived and no further income shall be paid."

## V.

Denies each and every allegation contained in paragraphs VIII and IX, together with each and every allegation contained in paragraphs VI, VII, X and XI, to the effect that plaintiff became, was, has been, or now is, totally and permanently disabled, as defined in the policy, or entitled to waiver of premiums or to monthly income payments thereunder, and denies the allegations therein contained to the effect that defendant determined that plaintiff was so totally and permanently disabled, but admits that defendant received and retained certain writings purporting to be proofs of disability supplied by plaintiff, as mentioned in paragraphs VI and VII, and that, pursuant to the same, defendant waived payment of premiums from June 30, 1936, until June 30, 1941, and paid monthly income from July 15, 1935, until January 1, 1942, and that defendant discontinued such benefits, and, since such discontinuance, has refused and still refuses to allow the same, as alleged in paragraphs X and XI, and admits that defendant has paid under protest premiums in the total amount of \$1,368.12.

## VI.

Denies each and every allegation set forth or contained in the complaint not expressly admitted herein.

Wherefore defendant prays that plaintiff take

nothing by his action, and that defendant recover its taxable cost and such other relief as may be proper.

EVANS, HULL, KITCHEL,  
JENCKES & ROSS.

By /s/ NORMAN S. HULL,  
Attorneys for Defendant.

(Acknowledgment of Service.)

[Endorsed]: Filed Sept. 29, 1948.

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In the United States District Court  
for the District of Arizona

October, 1948, Term

At Phoenix

Minute Entry of Wednesday, October 13, 1948  
(Phoenix Division)

Honorable Dave W. Ling, United States District  
Judge, Presiding.

[Title of Cause.]

This case comes on regularly for trial this day. Lynn Laney, Esquire, and Grant Laney, Esq., appear as counsel for the plaintiff. Norman S. Hull, Esq., appears as counsel for the defendant. Louis L. Billar is present as Court Reporter.

Both sides announce ready for trial.

A lawful jury of 12 persons is now duly empanneled and sworn to try this case.

It Is Ordered that the remaining jurors be excused to further order.

Counsel for the plaintiff now reads the complaint

to the jury, and counsel for the defendant now reads the amended answer.

Plaintiff's Case:

Thomas J. Hughes is now duly sworn and examined in his own behalf.

The following Plaintiff's exhibits are now admitted in evidence:

- Exhibit 1. Letter.
- Exhibit 2. Letter.
- Exhibit 4. Letter.
- Exhibit 5. Copy of Letter.
- Exhibit 6. Letter.
- Exhibit 3. Letter.
- Exhibit 7. Copy of Letter.

And thereupon, at the hour of 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:00 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present, pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

H. L. Goss is now duly sworn and examined on behalf of the plaintiff.

Plaintiff's Exhibit 8, 8 X-rays, is now admitted in evidence.

Plaintiff's Exhibit 9, 13 X-rays, is now admitted in evidence.

Dr. J. H. Patterson is now duly sworn and examined on behalf of the plaintiff.

Plaintiff's Exhibit 10, 4 X-rays, is now admitted in evidence.

Thomas J. Hughes, heretofore sworn, is now recalled and further examined in his own behalf.

Plaintiff's Exhibit 11, 6 checks, is now admitted in evidence.

And thereupon, at the hour of 4:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to 10:00 o'clock a.m., October 14, 1949, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

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In the United States District Court  
for the District of Arizona

October, 1948, Term

At Phoenix

Minute Entry of Thursday, October 14, 1948  
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, Presiding.

[Title of Cause.]

This case comes on for further trial this day. The jury and all members thereof and counsel for respective parties being present pursuant to recess

and further proceedings of the trial are had as follows:

Plaintiff's Case Continued:

Thomas J. Hughes, heretofore sworn, is now recalled and further examined on his own behalf.

And thereupon, at the hour of 12:00 o'clock noon, It Is Ordered that the further trial of this case be continued until 2:00 o'clock p.m., this date, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

Subsequently, at the hour of 2:00 o'clock p.m., the Jury and all members thereof, the parties and counsel for respective parties being present, pursuant to recess, further proceedings of trial are had as follows:

Plaintiff's Case Continued:

A. W. Crane is now duly sworn and examined on behalf of the plaintiff.

Roy Painter, is now duly sworn and examined on behalf of the plaintiff.

H. J. Evans is now duly sworn and examined on behalf of the plaintiff.

George L. Freestone is now duly sworn and examined on behalf of the plaintiff.

Louise Lind is now duly sworn and examined on behalf of the plaintiff.

Charles Saylor is now duly sworn and examined on behalf of the plaintiff.

Whereupon, the Plaintiff rests.

At 3:10 o'clock p.m. the jury, being first duly admonished by the Court, is excluded from the Court Room.

Counsel for the Defendant now moves for a directed verdict. Said motion is now argued by respective counsel and is submitted.

And thereupon, at the hour of 3:45 o'clock p.m., It Is Ordered that the further trial of this case be continued to 10:00 o'clock a.m., tomorrow, to which time the jury, being first duly admonished by the Court, the parties and counsel are excused.

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In the United States District Court  
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Friday, October 15, 1948  
(Phoenix Division)

Honorable Dave W. Ling, United States District Judge, presiding.

[Title of Cause.]

The jury and all members thereof and counsel for respective parties being present pursuant to recess and further proceedings of the trial are had as follows:

It Is Ordered that the Defendant's Motion for a Directed Verdict be and it is granted. The Jury is now instructed to return a verdict in favor of the

defendant. Herbert F. Leo is now appointed Foreman and now signs and presents the following verdict:

Civil 1153—Phoenix

“THOMAS J. HUGHES,

Plaintiff,

Against

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,

Defendant.

### VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant.

HERBERT F. LEO,  
Foreman.”

Counsel for the plaintiff now objects to Court’s ruling on motion for a Directed Verdict. The Jury is now discharged and excused until further order.

On motion of Norman S. Hull, Esq., It Is Ordered that judgment for the defendant on verdict be entered by Clerk.

On stipulation of counsel, It Is Ordered that plaintiff be allowed to withdraw defendant’s Exhibit B for identification, suitcase and present contents.

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[Title of District Court and Cause.]

### FILINGS—PROCEEDINGS

1948—Oct. 15. Enter judgment for defendant on the verdict (docketed 10/15/48).

[Title of District Court and Cause.]

Civil 1153—Phoenix

VERDICT

We, The Jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the defendant.

/s/ HERBERT F. LEO,  
Foreman.

[Endorsed]: Filed Oct. 15, 1948.

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[Title of District Court and Cause.]

PLAINTIFF'S MOTION FOR NEW TRIAL,  
NOTICE THEREOF AND MEMORANDUM  
OF POINTS AND AUTHORITIES

The plaintiff, Thomas J. Hughes, respectfully moves the court for an order setting aside the instructed verdict in favor of the defendant and the judgment entered thereon, and granting the plaintiff a new trial, in the above entitled cause, upon the following grounds, to-wit:

1. That the court's order directing a verdict for the defendant, the verdict so directed, and the judgment of the court upon said verdict, were not and are not justified by the evidence, and were and are contrary to law.
2. That the evidence introduced at the trial, taken as a whole, required that the question of the plaintiff's total and permanent disability, within the

meaning of the insurance policy set out as "Exhibit A" to the plaintiff's complaint, should have been submitted to the jury as a question of fact to be determined by the jury.

LYNN M. LANEY,  
GRANT LANEY,

By /s/ LYNN M. LANEY,  
Attorneys for Plaintiff.

NOTICE OF MOTION

To the defendant in the above entitled cause, and Messrs. Evans, Hull, Kitchel, Jenckes & Ross, its attorneys:

Please take notice that the undersigned will bring the above motion for new trial on for hearing before the court in the courtroom thereof in the Federal Court Building in Phoenix, Arizona, on the 1st day of November, 1948, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

LYNN M. LANEY,  
GRANT LANEY,

By /s/ LYNN M. LANEY,  
Attorneys for Plaintiff.

\* \* \* \*

[Endorsed]: Filed Oct. 22, 1948.

In the United States District Court  
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Monday, November 1, 1948  
(Phoenix Division)

Honorable Dave W. Ling, United States District  
Judge, presiding.

[Title of Cause.]

Plaintiff's Motion for New Trial comes on regularly for hearing this day. Grant Laney, Esq., appears as counsel for the plaintiff. Norman S. Hull, Esq., appears as counsel for the defendant. Plaintiff's Motion for New Trial is now argued by respective counsel.

It Is Ordered that Motion for New Trial be submitted and taken under advisement.

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In the United States District Court  
For the District of Arizona

October, 1948, Term at Phoenix

Minute Entry of Wednesday, January 12, 1949  
(Phoenix Division)

Honorable Dave W. Ling, United States District  
Judge, presiding.

[Title of Cause.]

It Is Ordered that Plaintiff's Motion for New Trial be and it is denied.

[Title of District Court and Cause.]

**NOTICE OF APPEAL**

Notice Is Hereby Given that Thomas J. Hughes, the plaintiff in the above entitled cause, does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment rendered and entered in the above entitled court and cause, on the 15th day of October, 1948, and from the order denying plaintiff's motion for a new trial, made and entered in said court and cause on the 12th day of January, 1949.

Dated at Phoenix, Arizona, this 8th day of February, 1949.

**LANEY & LANEY,**

By /s/ GRANT LANEY,

Attorneys for Thomas J. Hughes, Plaintiff and Appellant.

[Endorsed]: Filed Feb. 8, 1948.

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[Title of District Court and Cause.]

**BOND ON APPEAL**

Know All Men By These Presents:

That we, Thomas J. Hughes, the plaintiff above named, as principal, and Hartford Accident and Indemnity Company of Hartford, Connecticut, as surety, are held and firmly bound unto The Mutual Life Insurance Company of New York, a corporation, defendant above named, in the sum of Two

Hundred Fifty (\$250.00) Dollars, lawful money of the United States, to be paid to said The Mutual Life Insurance Company of New York, a corporation, for which payment well and truly to be made we bind ourselves, our heirs, representatives, successors and assigns firmly by these presents.

The condition of this obligation is such that:

Whereas, a certain judgment was rendered and entered on the 15th day of October, 1948, in the above entitled court and cause, and

Whereas, the court on January 12, 1949, entered an order denying plaintiff's motion for a new trial, and

Whereas, the judgment and order were in favor of the above named defendant and against the principal on this bond, and

Whereas, the said principal has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from said judgment and from the order denying plaintiff's motion for a new trial;

Now, Therefore, if the said principal above named, shall prosecute his said appeal with effect and pay all costs if the appeal is dismissed or the judgment affirmed, and such costs as the United States Circuit Court of Appeals for the Ninth Circuit may award if the judgment is modified, then this obligation shall be void; otherwise it shall remain in full force and effect.

In Witness Whereof, said principal and surety

have executed these presents on this 8th day of February, 1949.

/s/ THOMAS J. HUGHES,  
Principal.

HARTFORD ACCIDENT AND INDEMNITY  
COMPANY OF HARTFORD, CONN.,  
Surety.

(Seal)        /s/ JOE C. HALDIMAN,  
                 Attorney-in-Fact.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 8, 1948.

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[Title of District Court and Cause.]

DESIGNATION OF RECORD AND PROCEEDINGS TO BE CONTAINED IN RECORD ON APPEAL

To Wm. H. Loveless, Clerk of the above entitled Court, and Evans, Hull, Kitchel, Jenckes & Ross, Attorneys for Defendant and Appellee:

Comes now Thomas J. Hughes, the Plaintiff and Appellant in the above entitled cause, by his attorneys, and designates the following records and proceedings in said cause to be contained in the record on appeal:

The final judgment, as entered by the Clerk, the reporter's transcript of the evidence, all pleadings, evidence, depositions, testimony, exhibits, minute entries, documents, papers, records, orders and pro-

ceedings in this action, including this designation, and all orders, papers and proceedings hereafter entered, filed or had in this action in this court.

There is filed herewith the reporter's transcript of the evidence.

Dated this 17th day of February, 1949.

LANEY & LANEY,  
By /s/ GRANT LANEY,  
Attorneys for Plaintiff and Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed Feb. 17, 1949.

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In the District Court of the United States  
for the District of Arizona

No. Civ. 1153-Phx.

THOMAS J. HUGHES,

Plaintiff,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a Corporation,

Defendant.

#### REPORTER'S TRANSCRIPT

The above-entitled and numbered cause came on duly and regularly to be heard in the above-entitled court before Hon. Dave W. Ling, Judge, presiding with a jury, commencing at the hour of 10:00 o'clock

a.m., on the 13th day of October, 1948, at Phoenix, Arizona.

The plaintiff was represented by Messrs. Laney & Laney.

The defendant was represented by Messrs. Norman S. Hull and Richard Meason, of Messrs. Evans, Hull, Kitchel, Jenckes & Ross.

The following proceedings were had:

The Clerk: Civil 1153, Phoenix, Thomas J. Hughes versus The Mutual Life Insurance Company of New York, a corporation, for trial.

The Court: Ready? [1\*]

Mr. Lynn Laney: Yes, your Honor, the plaintiff is ready.

Mr. Hull: The defendant is ready, your Honor.

The Court: Call the names of 18 jurors. As your names are called, come forward.

(Whereupon, 18 jurors were called, examined on their voir dire, after which 12 jurors were empaneled and sworn, and the pleadings were read to the jury by counsel for the respective parties.)

(Thereupon a brief recess was taken.)

All parties, as noted by the Clerk's record, being present, the trial resumed as follows:

The Court: You may call your first witness.

Mr. Lynn Laney: Mr. Hughes, will you take the stand?

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

## THOMAS J. HUGHES,

the above-named plaintiff, was called as a witness in his own behalf and, being first duly sworn, testified as follows:

## Direct Examination

By Mr. Lynn Laney:

Q. What is your name, please?

A. Thomas J. Hughes.

Q. And you are the plaintiff in this case?

A. I am. [2]

Q. Now I will ask you whether, on or about the 7th day of July, 1925, you obtained a life insurance policy from the defendant, The Mutual Life Insurance Company of New York?

A. I did.

Q. And is this the original policy that you have furnished us here? A. It is.

Q. Now I will ask you, Mr. Hughes, whether that is the policy, the exact photostatic copy of which is attached to the complaint that you filed in this case? A. Yes, it is.

Q. Now, Mr. Hughes, I will ask you whether in the early thirties you suffered any accident of any sort?

A. Yes, I was kicked with a mule and I think there was a third, fourth and fifth vertebra in the back was fractured.

Q. And that was when, as near as you can fix it, Mr. Hughes, the year?

A. Well, it is in '32, some time in '32.

Q. In 1932? A. Yes, it was.

(Testimony of Thomas J. Hughes.)

Q. Well, how long were you laid up with that?

A. Well, I couldn't say exactly, but it was— [3] well, I think I was confined to my bed for about eight months and then—

Q. Now, I will ask you whether then some time after that you had another accident?

A. Well—

Q. Just say yes or no, and then I will get at—

A. Yes.

Q. About when was that?

A. Well, that was in '35.

Q. And what was the general nature of that accident?

A. Well, I fell on the front steps and injured the back, was broken, the vertebrae in the back, they were broken and I have been laid up ever since.

Q. Now, I will ask you then, whether upon becoming so laid up some time in '35, you made application to the Company for your monthly benefits in accordance with the policy for permanent total disability? A. Yes, I did.

Q. And waiver of premiums. Did it include that, Mr. Hughes; did you include in it your application for waiver of premiums? A. I did.

Q. Now, well, during—

Mr. Laney: Will the Court pardon me, we have a [4] number of papers, I am sorry, I don't have the correct papers in my hand—(pauses). Well, I will ask that this be marked for identification, please, Mr. Clerk.

(Testimony of Thomas J. Hughes.)

(Thereupon, the document was marked as Plaintiff's Exhibit No. 1 for identification.)

Q. (By Mr. Laney): Mr. Hughes, I will show you Plaintiff's Exhibit 1 for identification and ask you whether you recognize it and whether you received it through the mail in due course about the date it bears of October 7th, 1935?

A. Yes, I did.

Mr. Laney: And that is from the Company. I will offer that in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 1 in evidence.)

Mr. Laney: With the Court's permission, I will read it briefly.

(Thereupon Plaintiff's Exhibit No. 1 in evidence was read to the jury by Mr. Laney.)

#### PLAINTIFF'S EXHIBIT No. 1

[The Mutual Life Insurance Company of New York Letterhead.]

Phoenix, Ariz., October 7, 1935.

Mr. Thomas J. Hughes  
Route No. 1 Box No. 29  
Tempe, Arizona

Policy No. 3,168,638

Dear Sir:

In connection with your claim for disability benefits under the above policy, we are pleased to ad-

(Testimony of Thomas J. Hughes.)  
vise that your claim has been approved.

We enclose herewith the Company's check, payable to your order, in the amount of \$208.28, which represents the payment of the benefit of \$52.07 due on July 15, 1935, and a like amount on the first of each month thereafter up to and including October 1, 1935.

We also enclose a card, which is to be filled in by you and returned to our Home Office in the envelope provided for that purpose.

Yours very truly,

/s/ FRED J. JOYCE,  
Manager.

REP:th enc-2

Q. (By Mr. Laney): Now, Mr. Hughes, where this letter says: "We also enclose a card, which is to be filled in by you and returned to our Home Office in the envelope provided for that purpose," did you return that card? [5]

A. I did.

Q. Now, I will ask you whether, prior to so allowing your claim, you were examined by the Company's—the doctors designated by and representing the Company? A. I was.

Q. And then I will ask you whether the Company thereafter for some time did pay you the monthly benefits provided in the policy and sent the waivers of insurance—waivers of premium?

(Testimony of Thomas J. Hughes.)

A. They did.

Q. And I will ask you whether, from time to time, they requested and obtained further medical examinations of you? A. Yes, they did.

Q. And I will ask you whether you complied with every request they made for medical examinations or for proof of your condition?

A. I did.

Mr. Laney: Well, just as an example, I will ask this be marked for identification.

(The document was marked as Plaintiff's Exhibit No. 2 for identification.)

Q. (By Mr. Laney): I will show you a letter purporting to be dated June 28th, 1937, that purported waiver of premium. I will ask you whether you [6] recognize that and whether you did receive it through the due course of mail about that date?

A. Yes, I did.

Mr. Laney: And I will offer that in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 2 in evidence.)

Mr. Laney: With the Court's permission, I will read it.

(Thereupon Plaintiff's Exhibit No. 2 in evidence was read to the jury by Mr. Laney.)

(Testimony of Thomas J. Hughes.)

PLAINTIFF'S EXHIBIT No. 2

[The Mutual Life Insurance Company of New York Letterhead.]

Phoenix, Ariz., June 28, 1937.

Mr. Thomas J. Hughes,  
Tempe, Arizona.

In re Pol. 3168 638.

Dear Mr. Hughes:

In accordance with the disability clause in your policy, the Company has approved the waiver of premium due June 30th, 1937, and the receipt is enclosed herewith.

Disability payment will be continued.

Very truly yours,

/s/ FRED J. JOYCE,  
Manager.

REP

The Mutual Life Insurance Company of New York  
Home Office, 34 Nassau Street, New York, N. Y.

WAIVER OF PREMIUM

To Thomas J. Hughes, Insured under Policy No.  
3168,638.

Under the provisions of this policy, giving disability benefits under the conditions stated therein, The Mutual Life Insurance Company of New York

(Testimony of Thomas J. Hughes.)  
hereby waives payment of the premium on the said  
policy, falling due as follows:

Amount of Premium, \$228.02.

Due Date of Premium, June 30, 1937.

New York, N. Y., this May 27, 1937.

/s/ Illegible,  
Secretary.

Countersigned:

/s/ E. D. WILLIAMS,  
Registrar.

Q. (By Mr. Laney): Now, Mr. Hughes, I will ask you whether the Company did send you waivers of the premium each year then for all of those years up to and including the year '41?

A. Yes, they did.

Q. And then I will ask you whether, on each month they did send you the disability benefits up to and including the one falling due in January of '42? A. Yes, they did.

Q. And they would in each of those years send you a similar form of waiver of premium similar to the waiver of premium attached here to Plaintiff's Exhibit 2? A. Yes, they did. [7]

Q. Now, Mr. Hughes, I will ask you whether from the time when your disability benefits were first started there in the year '35 until the present time, whether you had gotten better or gotten worse? A. Well, I have got worse.

Mr. Laney: I will ask that this be marked for identification as one exhibit and then this as another exhibit.

(Testimony of Thomas J. Hughes.)

(Thereupon the documents were marked as Plaintiff's Exhibits 3, 4, 5 and 6 for identification.)

Q. (By Mr. Laney): Then, Mr. Hughes, I will show you a purported letter here which has been marked as Plaintiff's Exhibit 4 for identification, and I will ask you whether you recognize that and whether you did receive that through the mail in due course about the date it bears, or shortly thereafter?

A. Yes, I did.

Mr. Laney: I will offer Plaintiff's Exhibit 4 for identification in evidence.

Mr. Hull: No objection.

(The document was received and marked as Plaintiff's Exhibit 4 in evidence.)

Mr. Laney: I will read this.

(Thereupon Plaintiff's Exhibit 4 in evidence was read to the jury by Mr. Laney.)

#### PLAINTIFF'S EXHIBIT No. 4

[The Mutual Life Insurance Company of New York Letterhead.]

Mr. Thomas J. Hughes  
Route No. 1, Box 49  
Tempe, Arizona

May 20, 1942.

RE: Policy 3168 638

We have given careful consideration to the allowance of further disability benefits under your policy. As you will observe from your policy, it provides for the allowance of disability benefits upon

(Testimony of Thomas J. Hughes.)

receipt of due proof that you have become totally and permanently disabled in accordance with the policy provisions.

We regret to advise you that in our opinion, the proofs which have been submitted to this Company on your behalf are not sufficient to show you to be totally and permanently disabled in accordance with the policy provisions; now have we obtained other information which shows you to be totally and permanently disabled. These reasons for not approving further benefits must necessarily be without prejudice to the Company's right to assert other reasons which may exist.

We assure you that it is the Company's earnest desire to fulfill its part of the policy contract and to avoid withholding or denying the payment of any benefits to which you may be justly entitled. We will, of course, be pleased to give every consideration to any additional proof which you wish to submit.

Under the present circumstances, it will be necessary to pay within the days of grace all future premiums as they may become due.

We sincerely regret that the circumstances do not permit us to allow further benefits.

Yours very truly,

/s/ A. H. McKINLEY,  
Superintendent.

By /s/ J. MacLEOD.

JMcL:FL

(Testimony of Thomas J. Hughes.)

Mr. Laney: Now, Mr. Hughes, upon your getting that letter of May 20th, 1942, that letter that was just introduced in evidence as Plaintiff's Exhibit 4, I will ask you whether you came in to see an attorney?      A. I did.

Q. And which attorney did you see?

A. Mr. Laney—Grant Laney.

Q. Mr. Grant Laney here?      A. Yes.

Q. And then I will call your attention to Plaintiff's Exhibit 5 for identification—may I ask with permission of the Court, does counsel have the original letter of June 1st, 1942?

Mr. Hull: I don't believe I have it with me. I have no objection to it being a copy.

Q. (By Mr. Laney): I will show you what purports to be a carbon copy of a letter dated June 1st, 1942, written by Laney and Laney to the Company relative to this matter, I will ask you to look it over and state whether you recognize it and whether you were present when it was dictated and when it was written out?

A. Yes, I was.

Q. And I will ask you to state who actually [9] dropped that into the mail, if anyone, if you know?

A. I put it in the mail.

Q. You put it in the mail?      A. Yes.

(Testimony of Thomas J. Hughes.)

Q. And was it in a stamped envelope addressed to this Company? A. It was.

Q. As set forth in this carbon copy of the letter?

A. Yes, it was.

Mr. Laney: I will offer this, Plaintiff's Exhibit 5 for identification, in evidence.

Mr. Hull: Your Honor please, I object on the ground that it is self-serving. It is merely a statement of the attorneys stating its view to the Company.

Mr. Laney: May it please the Court, in view of the fact that they say in their letter of May 20th, 1942, in which they attempt to discontinue these, they say that: "We will, of course, be pleased to give every consideration to any additional proof which you wish to submit." We wish to show that we asked them what they needed and then we did everything that they asked us to do.

The Court: All right, it may be received.

(Thereupon the document was received and marked [10] as Plaintiff's Exhibit 5 in evidence.)

Q. (By Mr. Laney): Now, Mr. Hughes, may I ask—do you recall whether this letter—the original of which was on the form of stationery of my law firm, of Grant Laney's law firm?

A. Yes, it was.

(Thereupon Plaintiff's Exhibit 5 in evidence was read to the jury by Mr. Laney.)

(Testimony of Thomas J. Hughes.)

PLAINTIFF'S EXHIBIT No. 5

June 1, 1942.

Mutual Life Insurance Company of New York  
Bureau of Disability Claims  
34 Nassau Street  
New York, New York

Re: Policy No. 3168 638

Gentlemen:

Mr. Thomas J. Hughes of Tempe, Arizona, has consulted this office relative to your letter dated May 20, 1942, in which you state that it is your opinion that the proofs which have been submitted to your company on behalf of Mr. Hughes are not sufficient to show him to be totally and permanently disabled in accordance with the above-numbered policy provisions, and in which you further state that no further disability benefits will be paid. In this letter you also state that you will be pleased to give every consideration to additional proof of his disability which Mr. Hughes may wish to submit.

We wish to advise you that Mr. Hughes, before he reached the age of sixty years, became totally and permanently disabled within the meaning of the disability benefit provisions contained in his life insurance policy with your company, and that he has been so disabled continuously to the present time, and, in fact, Mr. Hughes is in a much worse condition now than he was in when your

(Testimony of Thomas J. Hughes.)

company first commenced paying him his disability benefits.

Accordingly, since you state that you are willing to consider additional proofs, we are asking you, on behalf of Mr. Hughes, to direct us as to what further proofs should be submitted. Since Mr. Hughes' condition is so much worse now than it was when he first commenced receiving the disability benefits, he is at a loss to understand the statement in your letter to the effects that the proofs heretofore submitted are not sufficient to show him totally and permanently disabled within the provisions of the policy, and is at a loss to understand why you have ceased paying him the disability benefits, and why you are demanding the payment of further premiums upon his policy.

Since Mr. Hughes is now totally and permanently disabled within the provisions of your policy, we, on behalf of Mr. Hughes, now demand that your company pay Mr. Hughes the past due disability benefits which you have failed to pay to him; that you continue to pay them in accordance with the terms of his policy; and that you waive further premium payments.

Mr. Hughes, however, is willing to submit what further proofs your company desires, as he can easily establish beyond any doubt the fact that he is entitled to disability benefits and a waiver of premiums, and thereby avoid litigation.

Mr. Hughes delivered to your Mr. Allen of Tucson, Arizona, and Dr. Woodman of Phoenix two

(Testimony of Thomas J. Hughes.)

different sets of X-rays upon the understanding that they would be returned to him, and we trust that your company will see that these X-rays are so returned to him in due course.

Please advise us as to what further proofs of disability you desire.

Very truly yours,

LANEY & LANEY.

GL:MB

Q. (By Mr. Laney): Now, Mr. Hughes, where there is a recital that you had delivered to the Company's Mr. Allen, of Tucson, Arizona, and Dr. Woodman, two different sets of X-Rays, I will ask you whether you had delivered such to those two gentlemen? A. Yes, I did.

Q. And were the X-Rays of your body, and so on, purporting to show disabilities?

A. Yes, sir; they were.

Q. Now, I will call your attention to Plaintiff's Exhibit 6 for identification, and ask you whether you recognize that as the letter that was shown to you about that date by your attorneys?

A. Yes, I do.

Mr. Laney: I offer Plaintiff's Exhibit 6 for identification in evidence.

Mr. Hull: We object on the same grounds, that it refers to the letter that counsel just read, it is a self-serving declaration and neither document is admissible in evidence.

The Court: It may be received.

(Testimony of Thomas J. Hughes.)

(Thereupon the document was received in evidence as Plaintiff's Exhibit 6.)

(Thereupon Plaintiff's Exhibit 6 in evidence was read to the jury by Mr. Laney.)

### PLAINTIFF'S EXHIBIT No. 6

[The Mutual Life Insurance Company of New York Letterhead.]

Laney & Laney

June 4, 1942.

Attorneys at Law

Luhrs Tower, Phoenix, Arizona

Thomas J. Hughes, Tempe, Arizona, Policy No.  
3168,638

Gentlemen:

Your letter dated June 1, 1942, has been received.

For your information, we wish to advise that it is our intention to have a Company Representative call upon you for a full discussion of the insured's claim with this Company.

Yours very truly,

/s/ A. H. McKinley,  
Superintendent.

/s/ F. ZUJUBAUER.

FZ:EN

Q. (By Mr. Laney): Now, Mr. Hughes, after the Company had made this statement that they would be glad to receive any other—in substance, they would be glad to receive any other proof of

(Testimony of Thomas J. Hughes.)

disability you wanted to submit, and after your doctors had asked them what they wanted, I will ask whether you did furnish everything that they asked for?      A. I did.

Q. And I will ask you whether at any time they ever asked you to submit to their doctor for examination you did that?      A. I did.

Q. Or for X-Rays or for anything else.

A. I furnished them whatever they wanted.

Q. Now, calling your attention to Plaintiff's Exhibit 3, I will ask you whether—now, when was it they first cut off paying the disability benefits, [12] the last one they paid?

A. January 1st, 1942, was the last one they paid.

Q. Now, after they cut those off, but before Mr. Grant Laney's letter of June 1st, 1942, I will ask you whether any of their representatives called upon you for further data?      A. They did.

Q. I will show you Plaintiff's Exhibit 3 for identification and will ask you to look it over and state whether their representative gave you that about the time of the date it bears?

A. Mr. Allen gave me this letter after I had turned over the X-Rays to him that he wanted.

Q. And was he the Company's representative from Tucson?

A. He was, he represented himself to be the attorney from Tucson.

Q. And I will ask you then whether you did furnish the things that that purports to be a receipt for?

(Testimony of Thomas J. Hughes.)

A. I did, I furnished them X-Rays.

Mr. Laney: I offer in evidence Plaintiff's Exhibit 3 for identification.

Mr. Hull: No objection.

(The document was marked and received as Plaintiff's Exhibit 3 in evidence?)

Mr. Laney: With the Court's permission, ladies and gentlemen, I will read this, in pen and ink, dated March 9th, 1942.

(Thereupon Plaintiff's Exhibit No. 3 in evidence was read to the jury by Mr. Laney.)

### PLAINTIFF'S EXHIBIT No. 3

March 9, 1942.

Received from Mr. Thomas J. Hughes one set of x-ray film (4 small & 3 large), taken 6-20-38, and one set of x-ray film (3 large & 1 small), taken 12-9-35.

This film is being borrowed by the Mutual Life Insurance Co. of New York & will be returned to Mr. Hughes.

/s/ LESLIE B. ALLEN.

Q. (By Mr. Laney): Now, I will ask you further whether, when they were discussing the matter of cutting you off, you went to any, at their request, to any other doctors and were examined by any other doctors, just by yes or no?

A. Yes.

(Testimony of Thomas J. Hughes.)

Q. What doctors?

A. One of them was Dr. Woodman here.

Q. Dr. Woodman, of Phoenix, here, a physician and surgeon of Phoenix? A. Yes.

Q. Is that correct, he is a physician and surgeon here? A. Yes, he is.

Q. And who else? A. Dr. Baldwin.

Q. I will ask you whether or not Dr. Baldwin is also known as a physician and surgeon here in Phoenix?

A. Well, I think he is, but I don't know. [14]

Q. I will ask you whether Mr. Allen, the representative of the Company, brought any doctor to you?

A. Yes, he brought a doctor up from Tucson.

Q. What did they do?

A. They examined me there in the room and at my home and—

Q. You live, please, Mr. Hughes, where?

A. Three and one-half miles southeast of Tempe.

Q. And you have a farm there, do you?

A. Yes, I have.

Q. Now, can you remember about the time that it was that Mr. Allen, the Company's representative, brought this doctor from Tucson there to examine you at your home?

A. Well, it was some time later than the time that I come over here to Woodman and Baldwin. It was after that.

Q. That is, calling your attention to the letter of May 20th, 1942, which is in evidence as Plain-

(Testimony of Thomas J. Hughes.)

tiff's Exhibit 4, do I understand you that it was later than that, or do you remember?

A. Well, I think it was, but I am not sure.

Q. At any rate, they did come and examine you there and it was after the time they cut you off?

A. Yes. [15]

Q. I will ask you whether you cooperated and did everything they asked you to in the examination? A. I did.

Q. And what did their doctor, representing you, say to you?

Mr. Hull: Your Honor please, I object to that as hearsay, the doctor not being on the stand.

Mr. Laney: I misstated my question, may I withdraw it?

Q. What was said there, if anything, in the presence of this representative for the defendant Company, Lesley B. Allen, by the doctor that he brought there to examine you on behalf of the Company there at your house, southeast of Tempe, on this occasion in '42 that you have mentioned?

Mr. Hull: The same objection, your Honor.

The Court: He may answer.

Q. (By Mr. Laney): What was said? Go ahead, tell us.

A. He said he didn't see how I could walk without braces on account of the arthritis was bad in the hip.

Q. Now, what did Mr. Allen say to you there at that same time and place and in the presence of these same people? [16]

(Testimony of Thomas J. Hughes.)

Mr. Hull: Your Honor please, the extent of Mr. Allen's authority, who is merely an attorney in Tucson, has not been shown. We object to that as hearsay.

Mr. Laney: Well, I submit he was there and examined him.

The Court: He was there on the Company's business?

Mr. Laney: Yes.

The Court: He may answer.

Q. (By Mr. Laney): Go ahead and tell what Mr. Allen said.

A. He told me they were just going to knock out every insurance policy that was a losing game, that wasn't paying, and that was what his object was.

Mr. Hull: Your Honor please, I move that the answer be stricken, it is prejudicial and not binding on the Company.

The Court: Yes.

Mr. Hull: And the jury instructed to disregard it.

The Court: Disregard it.

Q. (By Mr. Laney): Then, Mr. Hughes, after they had cut you off, then when the next premium payment came due, and which would be due except for your [17] claim of disability, I will ask you whether you consulted with Mr. Grant Laney about what you should do, about whether you should pay the premiums? A. I did.

Q. And thereafter did you—I will ask you

(Testimony of Thomas J. Hughes.)

whether you thereafter paid them under protest?

A. I did.

Mr. Laney: Now I will ask, please, Mr. Clerk, that this be marked for identification.

(Thereupon the document was marked as Plaintiff's Exhibit No. 7 for identification.)

Mr. Laney: I will show you Plaintiff's Exhibit No. 7 for identification and ask you to look that over and state whether or not you recognize that as a carbon copy of a letter that you mailed?

A. Yes, I do.

Q. Who dictated the letter, do you remember whether—where that letter was composed?

A. I think it was Mr. Grant Laney?

Q. Look it over carefully and if you are sure, say so, and if you are not, say so.

A. Yes, that is true, I recognize it.

Q. I will ask you whether you signed that letter? A. Yes, I did.

Q. I will ask you whether you dropped it in the [18] mail? A. Yes, I did.

Q. Was it addressed in an envelope, stamped and addressed to whom it was addressed?

A. It was.

Mr. Lamey: I will offer Plaintiff's Exhibit 7 for identification in evidence.

Mr. Hull: Your Honor please, we object on the same ground, it is a self-serving declaration.

Mr. Laney: This is saying that we do it under protest.

(Testimony of Thomas J. Hughes.)

The Court: You are paying the premiums under protest?

Mr. Laney: Yes, that is the purpose of that.

The Court: All right, it may be received.

Mr. Hull: I might state, your Honor please, we admitted all of this.

The Court: I know. It seems a waste of time.

Mr. Laney: Yes, it states it is under protest, but it doesn't say the terms of the protest. The reason they don't admit anything except it was paid under protest.

The Court: Isn't that enough? What else would there be about money and paying it under protest?

Mr. Laney: With the Court's permission may I read this? [19]

The Court: Yes.

(Thereupon Plaintiff's Exhibit No. 7 in evidence was read to the jury by Mr. Laney.)

#### PLAINTIFF'S EXHIBIT No. 7

Tempe, Arizona, June 27, 1942.

Mutual Life Insurance Company of New York  
P. O. Box 1711  
Phoenix, Arizona

Gentlemen:

Re: Policy No. 3168,638—  
Thomas J. Hughes

I am enclosing herewith two checks drawn by myself in favor of your company on the Tempe National Bank, each being dated June 27, 1942. One

(Testimony of Thomas J. Hughes.)

of these checks is for the sum of \$228.02, and one of them is for the sum of \$30.00. The check in the amount of \$30.00 is for payment of the interest on the loan I procured from you on Policy No. 3168,-638; the check in the amount of \$228.02 is in payment under protest, as hereinafter mentioned, of the premium which but for my permanent total disability would be due June 30, 1942, on the above mentioned policy No. 3168,638.

I am making this payment of premium under protest because of the fact, as shown by proof heretofore submitted to you, that I am and ever since prior to my sixtieth birthday have been totally and permanently disabled within the provisions of said insurance policy, and therefore your company should waive payment of said premium. However, in view of the fact that your company has recently raised some question about my disability, I cannot afford to take the chance of losing my policy by failing to make any payments apparently falling due while this matter is pending and unsettled, although I feel that you will finally determine that I am so disabled.

I shall expect you to return this premium upon such continued disability being established.

Very truly yours,

Enclosures—2

Q. (By Mr. Laney): That, you say, was signed by you? A. Yes, sir.

The Court: We will suspend at this point until

(Testimony of Thomas J. Hughes.)

2:00. Keep in mind the Court's admonition and return at 2:00 o'clock.

(Thereupon a recess was taken at 12:00 o'clock noon.)

2:00 o'Clock P.M.

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

Mr. Laney: May it please your Honor, I spoke with opposing counsel, and with the permission—the permission of the Court, we will withdraw the witness for a moment and accommodate the time of the doctor.

The Court: Yes.

Mr. Laney: Will you come forward, Dr. Goss?

DR. H. L. GOSS

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. H. L. Goss.

Q. What is your profession?

A. Physician and surgeon.

Q. And I will ask you whether you have specialized in what we commonly call X-Ray work?

A. Yes, making X-Ray pictures.

Q. Are you duly licensed to practice as a physician and surgeon in Arizona? A. I am.

(Testimony of Dr. H. L. Goss.)

Q. What college did you get your preparation in?

A. The University of Kansas School of Medicine.

Q. And I will ask you how long you have been specializing in making and interpreting X-Rays.

A. Almost 29 years in Arizona.

Q. Now, I will ask you whether you had occasion to make X-Ray pictures of Thomas J. Hughes—well, first, in the year '38? A. Yes. [21]

Mr. Laney: I will ask that this envelope which I see consists of three large and one small, a total of four purported X-Ray plates, that they be marked for identification.

(Thereupon the X-Rays were marked as Plaintiff's Exhibit 8 for identification.)

Q. (By Mr. Laney): Dr. Goss, I will ask you to examine the contents of Plaintiff's Exhibit 8 for identification and state whether you recognize those—may it please the Court, I will have to correct my statement as to the contents. I find there are more than what I thought they were, and we will correct that a little later. Do you recognize those—(handing documents to the witness) ?

A. Yes, these are all films which I had made of Mr. Hughes.

Q. That is, Mr. T. J. Hughes, the plaintiff in this case? A. Yes.

Q. And when did you make them?

A. I have two sets here, some of which we made in '38, and others more recently.

(Testimony of Dr. H. L. Goss.)

Q. Well, are these, though—

A. There is one made here in '48.

Q. Oh, there is one mixed in. Just pick out those that were made in '38, I want to keep them [22] together. We may have had them mixed.

A. All but this one (indicating).

Q. This is '48, is it? A. Yes.

Mr. Laney: May it please the Court, may I correct my statement? When I had this marked for identification, I thought that it was a given number, and you correct me if I am not correct, Doctor. I see, then, in this exhibit that was marked for identification, those of the 1938 taking are 1, 2, 3 large ones, and then 1, 2, medium sized ones, and then two smaller ones, and then one real small one, is that correct? A. Yes.

Q. Now, I will ask you, Dr. Goss, if those several X-Ray plates included in Plaintiff's Exhibit 8 for identification, are true and accurate X-Rays of this particular patient? A. Yes.

Mr. Laney: I will offer them in evidence.

Mr. Hull: No objection.

Mr. Laney: Then the same ones, may it be understood, that I enumerated them at the last?

The Court: Yes, I think we understand that.

Mr. Laney: I think so.

(Thereupon the documents were marked and received as Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Laney): Now, Dr. Goss, from this X-Ray study of this patient, will you tell the jury what you found? A. Yes.

(Testimony of Dr. H. L. Goss.)

Q. Well, did you make a written report at the time of it? A. Yes.

Q. Will you refresh your memory from that?

A. I have that report with me.

Q. Well, go ahead, and as near as you can, tell accurately what you found.

A. Well, we made views of various portions of the—Mr. Hughes' body, among which was the right shoulder, the pelvis, the lumbar vertebrae, the left foot, and the left hand.

Q. Well, now, beginning with the right shoulder, what did you find wrong there, if anything?

A. The right shoulder presents calcification of the subdeltoid bursa with possible attachment to the head of the humerus.

Q. Will you explain what that was, what disease, if any, it manifested?

A. That disease—I have not completed the report on that; may I?

Q. Go ahead. [24]

A. The lower margin of the articulating surface of the right scapula also reveals pronounced arthritic budding.

Q. What is "scapula"?

A. This is a condition which we chemists know as arthritis, osteo arthritis, and its cause, of course, no doctor has yet answered what causes it.

Q. Pardon me, Doctor, just so that we understand it as we go along, what is "scapula," the right scapula?

A. The right scapula is the right shoulder blade.

(Testimony of Dr. H. L. Goss.)

Q. Go ahead and tell what else you found.

A. All right. Now, the pelvis. The bones of the pelvis reveal hypertrophic arthritis, which is especially marked on the outer margin of each acetabulum and inferior borders of the sacroiliac synchondrosis, that means that these arthritic lesions are especially marked on the outer margin of each acetabulum. Now, "acetabulum" is the socket into which the hip bone joint fits, and the sacro-iliac synchondrosis, there is one on each side, that is the joint between the sacrum and the iliac bone.

Q. Go ahead.

A. Now, the lumbar vertebrae in both the [25] anterior posterior and lateral views show massive hypertrophic bone changes especially noted in the bodies—

Q. Now, will you pardon me, lumbar vertebrae, where are they? Will you point on me where they are?

A. Approximately from here to the upper part of your buttocks. There are five of those vertebrae.

Q. Will you explain that further, then, what you found there?

A. I haven't finished reading the report yet—especially noted in the bodies, with ankylosis between the transverse process of the fifth lumbar and the sacrum. That means that the same bone changes are noted in the region of the lumbar vertebrae which I have described in the other portions of the body. Now, the left foot, the dorsal bones show pronounced budding. The left hand: The left hand shows the

(Testimony of Dr. H. L. Goss.)

heretofore mentioned arthritic changes in the carpal bones and in the phalanges. These are the carpal bones and these are the phalanges, the finger bones.

Q. Now, that is the left hand? I am not quite plain about the right shoulder. What did you find there? [26]

A. That is the first one I read on the right shoulder.

Q. Now, you mentioned here that there was ankylosis. Will you explain what "Ankylosis" is?

A. Well, ankylosis is the fixation of one bone to another. The joint is firmly grown across by a new bone tissue which has formed.

Q. Then if I had ankylosis sufficiently in my elbow I couldn't move or bend it, is that it?

A. No.

Q. Now, will you go ahead and explain to the jury how this arthritic condition comes about; what it is; what is deposited there and how it comes about, so they will understand?

A. Well, if the jury understands it they will do more sometimes than I think I can do, because the cause of it is not truly known. It is arthritis—osteoarthritis, and it consists of a thickening of the bone, the addition of calcium salts to the bone so that the bone increases in size in certain areas, and in that way it causes hypertrophic or enlargement. That is about as clearly as I can define it.

Q. Now, Doctor, I will ask you whether, at our request, you brought along a view box that would show this? A. Yes, I did. [27]

(Testimony of Dr. H. L. Goss.)

Q. Will you take some of the X-Rays which are included in Plaintiff's Exhibit 8 and show to the jury where this arthritis, these arthritis deposits are and explain them. Now, that one (handing the document to the witness).

A. This is the pelvis. This is the right side and this is the outer margin of the acetabulum socket for the hip joint. Here it is on the outside. In here are your sacrum bones, here, these joints in the sacrum, and here is your lower lumbar in this particular region, which, in this case, is joined together. These hooks or horns or arthritic buds are shown here.

Q. Now, show some of these deposits—where is this—from the osteo-arthritis, where the deposits are.

A. Well, I have shown them here and here and here (indicating), and you see this roughened place here on the pubic bone, and it shows better in some of the other films. This is practically the same view of the one I just described, but it takes in more of the lumbar vertebrae. You see those horn-like protuberances here?

Q. Those are the arthritic—

A. Those are the arthritic lesions, yes. Now, [28] this is a side view or a lateral view, this being the left side. You will notice the condition here, it has almost grown together here. All of those vertebrae show that same arthritic thickening.

Q. Then as I understand it, here is the pelvic region and this is the backbone up here?

A. That is right. This is the shoulder, the right shoulder joint. This is the bursa which I described

(Testimony of Dr. H. L. Goss.)

before. It shows these calcified deposits in this region here. There is also some roughening up here in the caricord process of the scapula. That is essentially all there is in that particular film. These are the bones of the left foot. There are arthritic changes up here in the phalanges and the tarsal bones. You notice these little nodules at the extremity of these buds, we call them. Here is rather large calcification on the heel bone, with a spur here. Here are also other arthritic lesions. This is the left hand. That is one view, and this is another view of the same. You will notice these same arthritic buds we see here, what we call the carpal bones, and then we find that in the phalanges or the bones of the fingers. They are quite pronounced here. Also seen here in this wrist joint as I have already described it. I think—this is just a [29] small film but it shows the same condition, however.

Q. These are the osteo-arthritis—

A. Arthritis. This is the sesamoid bone here.

Mr. Laney: All right. Thank you, Doctor. May I just return these?

Q. Now, Dr. Goss, I will ask you whether about April 30th, 1948, you again took X-Rays of Mr. T. J. Hughes and made a study of his condition?

A. What was that date?

Q. Well, in '48, I believe April 30th or thereabouts. A. No, not—

Q. What date was it?

A. Not April, it was—

Q. September of '48. I am informed that these

(Testimony of Dr. H. L. Goss.)

are in a different envelope from what they originally came. Now, Doctor, I will show you a certain envelope here and ask you if all of these are your X-Ray pictures of Mr. Hughes in the year '48. Then, if they are, I will have them marked for identification. I don't want some in that are not at the same time.

A. Yes, these were all made in '48.

Mr. Laney: Then I will ask, if it please the Court, the envelope containing those I should [30] identify may be marked for identification.

(The documents were marked as Plaintiff's Exhibit 9 for identification.)

Q. (By Mr. Laney): Well, this exhibit, these in Plaintiff's 9 for identification that you have just identified, I will ask you whether they are true and accurate X-Rays of this same patient, T. J. Hughes?

A. Yes.

Q. Made in '48? A. Yes.

Mr. Laney: I will offer them in evidence.

Mr. Hull: We object to these on the ground they have no bearing on this case. The disability period here involved in this litigation ends January 1st, 1948, so it is outside of the scope of the issues in this case.

Mr. Laney: This condition, may it please the Court, is a condition and a continuing condition, and then we will prove that it did continue in the meantime and at all times.

The Court: All right, they may be received.

(Testimony of Dr. H. L. Goss.)

(The documents were marked as Plaintiff's Exhibit No. 9 in evidence.)

Q. (By Mr. Laney): Now, Dr. Goss, I am a little confused in my mind as to when you took these [31] pictures that are Plaintiff's Exhibit 9 for identification. A. September 30th, 1948.

Q. And what did you find from those pictures and from your study of them?

A. I found the same condition present which I have described with reference to the films made in '38, which is known as osteo arthritis. In these films the arthritis has increased in extent, which usually takes place as a man grows older.

Q. That is, in the event he has this kind of arthritis—that is, it increases if he has arthritis?

A. Yes, usually, yes.

Q. Well, will you explain to the jury briefly what you found and where the increases were? Now, that picture is that—what is that?

A. This is a picture of the pelvis. It shows the same condition previously described.

Q. And wherein has that increased? Would you explain that and show it and demonstrate that to the jury?

A. Well, this shows—the only way you could tell whether it has increased is to compare it with the other film, but in our opinion there is an increase in this region here, right here, [32] especially. This has almost grown together in these two—two buds, and this lateral view shows exactly the same pathology,

(Testimony of Dr. H. L. Goss.)

with the increase in deposit of calcium between these vertebrae, and in this case it has practically grown together. This is the first lumbar and the last dorsal vertebrae. This is a side view of the dorsal spine. This is a part of the vertebrae just above the lumbar. That extends from the neck down to where the lumbar vertebrae begins. You can see this condition here.

Q. What condition?

A. Condition of arthritis which I have described before. The same condition is present in all of these films. This is the right elbow joint. You see quite massive deposits here. This is the ulna, this is the radius, and the humerus.

Q. What effect would that have on the elbow in your opinion?

A. Well, the extent of it, it would limit motion of the elbow and very likely would cause the patient some pain, although I don't know about that in this particular case. This is the right elbow. This condition here is not quite so marked as it is in the left. There are, however, some arthritic bone changes. [33]

Q. Then as I recall it, the right shoulder is worse—the left elbow is worse than the right elbow?

A. I don't think I have a report on the right shoulder.

Q. Maybe not. Go ahead.

A. This is the right hand. You can see that these fingers out here are quite markedly aseptic. There are more calcified nodules in this than there were in the previous film. This is the left hand. I think we have described that.

(Testimony of Dr. H. L. Goss.)

Q. I thought only the right—

A. Well, this is the left, the left hand. These are the carpal bones here, those are the phalanges or bones of the fingers.

Q. What do you find that is abnormal about that?

A. The same condition. This is the right foot. These are the tarsal bones here with arthritic changes there, here and some in the phalanges of this foot, also here in the heel bone, and between that they call the metatarsal bone. This is the left foot which also shows the same condition of arthritis. Here is this spur down here again, and then the astragalus, the other tarsal bone showing here. These are pictures of the right knee, and this view, this lateral view you find calcification [34] of the patella ligament, and also I see buds on the upper margin and the lower margin of the patella.

Q. The patella is the kneecap?

A. Kneecap, and this is the tibia, which is quite pronounced with arthritic thickening here and also on the tibia. This condition is also seen in the anterior-posterior view. This is the left knee. It is approximately the same as the right.

Q. All right, thank you. Now, Doctor, I will ask you whether in your opinion this arthritic condition that you found in '38 did continue continuously from then until you took them in '48? A. Yes.

Q. Except as you say, it did grow worse?

A. I think it has increased.

Mr. Laney: That is all.

(Testimony of Dr. H. L. Goss.)

Cross-Examination

Mr. Hull:

Q. Dr. Goss, is Thomas Hughes a patient of yours? A. Pardon?

Q. Is Thomas Hughes a patient of yours?

A. No. [35]

Q. Have you ever attended him professionally?

A. No.

Q. Do you engage in the general practice of medicine and surgery, or is your practice limited to X-Rays?

A. No, my practice is limited to X-Ray and laboratory diagnosis alone.

Q. You never made a physical examination of Thomas Hughes, did you? A. Physical?

Q. Yes. A. No.

Q. Nor any other laboratory examination other than those X-Rays, is that correct? A. Yes.

Q. Now, when you referred to this arthritic condition and, particularly when you were describing the pelvic region and the lower extremities, you used the term, as I call it—recall it, hypertrophic arthritis; correct? A. Yes.

Q. And then in one or two instances you also used the term "osteo arthritis," is that correct?

A. That is right.

Q. Are they synonymous, do they mean the same thing? [36]

A. The term "osteo-arthritis" is the general term used for all arthritic lesions, and the hypertrophic arthritis is one in which there is a rather pronounced

(Testimony of Dr. H. L. Goss.)

increase in the calcium deposits in various regions of the body, usually around the joints.

Q. And you are now talking about hypertrophic arthritis? A. That is right.

Q. That is the one, the type which is characterized by pronounced increase in calcification; correct?

A. Yes.

Q. Hypertrophic arthritis is a disease of old age, is it not? A. No, not entirely, no.

Q. Well, isn't it true now, Dr. Goss, that at least 75 per cent of the men past 50 have arthritic changes, hypertrophic arthritis?

A. They have some form of arthritis. Hypertrophic form may not eventuate until later on, but usually men around 50 on up have some form of arthritis.

Q. I presume you know many men beyond 50 years of age who have hypertrophic arthritis, who are gainfully employed in occupations and businesses, [37] isn't that correct? A. Yes, I do.

Q. Now, as a man grows older it is natural for these hypertrophic changes to evidence themselves like they have in this case, isn't that true?

A. It is natural for them to increase in severity, yes.

Q. Now, do you know whether or not these 1948 films that you have testified about were ever submitted to the Mutual Life Insurance Company, the defendant in this case?

A. I have no personal knowledge that they were.

(Testimony of Dr. H. L. Goss.)

They may have been, but I don't know that they were.

Q. What is true, that the '38 pictures, they were sent to the Company, were they not, or do you know?

A. No, I don't know.

Q. Well, let me ask you this, Dr. Goss: Do you know whether or not during the time of the ten-year interval, between '38 and 1948, you or any physician or surgeon that you are associated with took any other X-Rays of the portions of the anatomy of Mr. Hughes that you have testified concerning? [38]

A. I think a set of films were made by the Pathological Laboratory. What doctor, I am not able to state unless it was Dr. J. H. Patterson. I think there was another set made.

Q. But you don't know anything about those?

A. I don't know of my personal knowledge.

Q. In other words, the only pictures you took were in 1938 and 1948, is that right? A. Yes.

Q. Did you personally take both of those sets of pictures?

A. Well, they were all taken under my direction. I took personally the first set and my radiologist took the second set, but it was under my supervision.

Q. Are you associated with Dr. Patterson in the practice of medicine? A. No, I am not.

Q. And, these two sets of X-Rays, one in '38 and the other set ten years later, in the Fall of this year, are the only sets of X-Rays that you took of Mr. Hughes, is that right?

(Testimony of Dr. H. L. Goss.)

A. That is my memory, yes.

Mr. Hull: That is all. [39]

Redirect Examination

Mr. Laney:

Q. Dr. Goss, counsel brought from you that a man past 50 years, at times, had some arthritis. Is it normal or ordinary for them to have any such arthritis as manifested in these pictures?

A. I would not think so to such extent as is shown here.

Mr. Laney: That is all.

Mr. Hull: That is all, Dr. Goss. Thank you.

Mr. Laney: Dr. Patterson.

DR. J. H. PATTERSON

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. J. H. Patterson.

Q. What is your profession?

A. Physician and surgeon.

Q. Are you duly licensed as a physician and surgeon and practicing here in Phoenix, Arizona?

A. Yes, sir.

Q. How long have you been practicing as a [40] physician and surgeon in Arizona?

A. Since '28.

Q. Were you first admitted here in Arizona when you came out of college? A. Yes, sir.

(Testimony of Dr. J. H. Patterson.)

Q. And what college, if any, are you a graduate of?

A. St. Louis University and Cincinnati.

Q. That is a medical college? A. Yes.

Q. Now, Dr. Patterson, do you know Mr. T. J. Hughes, the plaintiff in this case?

A. Yes, sir.

Q. And has he been a patient of yours?

A. Yes, sir.

Q. Since about when?

A. Oh, I think since about '35.

Q. Now, I will ask you whether you have examined various X-rays of Mr. Hughes that have been made down through the years at various times?

A. Yes, sir.

Q. Now, there is some X-rays here—pardon me—I ask that these be marked for identification.

(The X-rays were marked as Plaintiff's Exhibit 10 for identification.)

Mr. Laney: Q. Showing you Plaintiff's 10 for [41] identification here, purportedly taken by the Pathological Laboratory of the patient, T. J. Hughes, I will ask you whether those were taken pursuant to and under your direction?

A. Yes, they were taken at the instigation of my father and myself, who were practicing at that time.

Q. And I will ask you whether you have—they were taken in the due course of your medical practice in order to inform yourself as to the condition of this patient? A. Yes, sir.

Q. That was back in '35? A. Yes, sir.

Mr. Laney: We will offer those in evidence.

(Testimony of Dr. J. H. Patterson.)

Mr. Hull: I have no objection. I don't see the pertinency of this in '35, but I have no objection.

Mr. Laney: I want to show the condition at that time, and the entire condition. We won't take very much time on it.

The Court: All right, they may be received.

(Thereupon the documents were received as Plaintiff's Exhibit 10 in evidence.)

Mr. Laney: Q. Now, Dr. Patterson, back there in '35, what did you find as to the condition of [42] this patient, T. J. Hughes?

A. You want me to put these on the screen there?

Mr. Laney: Yes, I'd like to have you explain them, please.

(Thereupon the witness placed the X-ray plate in the screen.)

A. You can see beginning arthritis here in both the hip joints with a fuzziness there, and you can see it down along the lower part of those bones here in what we call the pubic and ischial bones. There isn't much change along in these places here. It is beginning to get a little feathering here all around across the hip bone there and you can see a little bit there, you can see a little bit there, a very small amount there, and you can see it beginning to feather out a little bit there and around in there, and also around in the pubic bone there.

Q. And then in just a general way will you show the others?

A. Here is a little bit more, according to this

(Testimony of Dr. J. H. Patterson.)

showing. This is taken from the side of the lumbar vertebrae, the part from the chest down to the hips. You can see this is the normal contour of the bone. You can see here where it is lipping [43] out and here where it has lipped out very prominently, and here, pretty far out there. There is the same condition there and a little bit right there. Now, this is taken anterior and posterior, taken from the front to the back. You can see a little bit of lipping of the same bone I showed to you before. It is not very prominent in this. There is another picture just like the other one taken at a slightly different angle which shows about the same thing.

Q. Now, Dr. Patterson, in the course of your studying of this patient's case, I will ask you if you were treating him, he was your patient and you were endeavoring to help him? A. Yes, sir.

Q. Now I will ask you whether in the course of your endeavoring to help him, you made studies of the X-ray pictures as we laymen would call them, that were taken in '38, the ones that were introduced in evidence as Plaintiff's Exhibit 8 here; did you study those? A. Yes, sir.

Q. Now, Doctor, I will ask you to tell the jury what you know of your own knowledge of this man's condition and how he acted, whether he got better, had progressed, and what about his pain and what [44] about his disability? Go ahead and tell us.

A. Well, I have been taking care of him since '35, and the condition that he is suffering from is chronic multiple hypertrophic arthritis, and the condition has gotten progressively worse, and he has

(Testimony of Dr. J. H. Patterson.)

gotten to the point to where, a number of years ago, he became totally disabled, in my opinion, from working.

Mr. Hull: Your Honor please, I move to have that statement stricken from the record unless he defines what he means by "totally disabled."

The Court: All right, disregard it.

Mr. Laney: What is your Honor's ruling?

The Court: The objection is sustained, of course.

Mr. Laney: All right, now. Dr. Patterson, go ahead and explain what—

A. Well, he has been under my treatment and we have given him all kinds of treatment to try to alleviate this pain and suffering that he has, and as in most of those cases, we are rather helpless, we have not been able to do much for it. He has gotten progressively worse.

Q. Now, Doctor, we will start with his right shoulder and his right arm. Will you describe that to the jury, how that is and how he can use [45] it, or whether he can use it?

A. Well, he can. You can see on the X-rays there has been an increase in the deposits of calcium in nearly all of his joints and, of course, through exercising, even though it is painful, he is able to keep motion in those joints, but he can't use them for very long at a time, because they give him too much pain and it aggravates the condition.

Q. And that is true, is it, of all of those joints?

A. Yes, sir.

Q. And if he should endeavor to take any—do any work that required physical effort or work, what

(Testimony of Dr. J. H. Patterson.)

would you say as to whether it would cause pain and what effect it would have on his health?

A. Well, it makes him feel worse and it makes him have to go to bed at times when he tries to exercise too much or tries to do anything.

Q. And what would you say as to his ability even to sit at a desk and write and hold down a job?

A. Well, due to the arthritis in his shoulder and in his elbow and his hand, it would be very difficult for him to do it. It would be hard for him to try to, because if he tries to use those [46] joints, it makes it just that much worse.

Q. What have you to say as to his ability, we will say, from '35 right on down to the present time, to walk, to walk about on the ranch or farm?

A. Well, in spite of any treatments we have given him, it has gotten progressively worse.

Q. And what have you to say as to what effect on him it would have if he tried to walk about his ranch to any extent?

A. Well, it aggravates the condition that is present.

Q. And what would you say as to whether it is painful or not?

A. Well, of course, as a subjective symptom, but he has every reason to have pain there from the evidence we have on the X-ray.

Q. Now, his condition as shown by the X-rays, is that a normal condition for a man of his age?

A. No, sir.

Q. And then, Doctor, as to the X-rays taken in '38, if you would be good enough to step this way,

(Testimony of Dr. J. H. Patterson.)

now, being in evidence as Plaintiff's Exhibit H, did you make a study of them in the course of your endeavoring to treat this man? A. Yes.

Q. Will you explain briefly to the jury some of [47] these and what effect they would have, in your opinion, on him?

A. Now, you can see—if you remember the side view of the lumbar vertebrae that I showed you in '35, you can see where this is grown to where it is together down to along in here and lipping over there, and accentuating that on this, it is just progressive.

Q. What about the rest of them?

A. Well, they show the same progression. You can see there, as you will remember I pointed out on an earlier film, there is a little feathering and a little more marked there, along in there, along in those areas; much more in there. You can see the anterior lateral view, looking from the front to the back, much more haziness, very cloudy, almost grown together along in there. That shows the same thing, only more clear. That shows it grown completely together, right in there.

Q. That would be, then, a stiff back?

A. Yes, between those joints it is immovable. Now, here it shows an X-ray of his right shoulder. It shows a very marked growth of calcium, deposit of calcium there around his shoulder joint, around the bursa underneath and all along through there. That is a picture of his left hand there. It does [48] not show much arthritis present in that one. It is just a little bit along in there and some along in

(Testimony of Dr. J. H. Patterson.)

there. You can see a small amount in there, some up in this one. It is not very extensive in that one. That one shows about the same thing, a fair amount there. You can see a little there, some growth there, but it is not viewed extensively there.

Q. From your study about the right hand, what did you notice?

A. Well, I haven't got the pictures on that. Now, this shows another view here of the left hand, which shows much more marked on the side view. You can see a lot of it there, a lot of it in these joints here when you take it from the side. It is paramount in that one there. It shows more from the side than it does from the anterior-posterior. There you can see a rather marked amount of arthritis along in here, along in those places there in the joints and some in there, and there is a spur back here, a growth.

Q. That is on his heel?

A. Yes, sir, a good deal here even in the soft tissues there around his ankle joint. You can see here a good deal of it there, the joint along in there. I think we showed this one. [49]

Q. That is the right shoulder?

A. Right shoulder.

Q. Now, Doctor, in the course of your study of this case, have you examined those that were taken more recently in '48? A. Yes, sir.

Q. Will you just briefly explain them, being Plaintiff's Exhibit 9?

A. There is one of the left hip or left knee, showing growth along in here in the joints, along in there. This shows a better view of the same one taken from

(Testimony of Dr. J. H. Patterson.)

the side. You can see all kinds of arthritis there and a lot of it around the kneecap there. This is even in the soft tissues out here. That shows approximately the same on the right side, arthritis along in the kneecap there. That is anterior-posterior. It does not show—it is about like the other one. It is on the right side. This is the left foot. Now, you can see a good deal of arthritis in there, that joint, around in there; a good deal around there. That one does not show as good as from the side. Now, this is the right side. Right here it shows a good deal more arthritic condition. It shows a lot of arthritis in the ankle joints there and down around those carpal bones in the left hand. It shows a [50] marked increase in the change in the joints here. He has lost a lot of calcium in the bones because of disuse, and if you just don't use those bones of the hand or the body, they lose their calcium content. That is the reason these look so thin, and he has lost so much calcium out of there because of disuse, and here is a lot of arthritis in these joints. There is a great deal of feathering, as you can see. A great amount around the thumb there, on the face of it. A great big amount there from the side. Here is the right one. It shows a good deal of absorption of the bone on the right side here, not quite as bad as the others in the other hand, though. A good deal of arthritis present there. Down in there, that joint and that joint is very marked. This one is very marked. This is the left elbow. This is taken from the side. You can see all kinds of arthritis there. Shows it there. This is the right side, shows very marked arthritis in the joint there, all that feather-

(Testimony of Dr. J. H. Patterson.)

ing there and excess growth here. It don't show as much from the anterior-posterior as it does from the side. This is taken of the chest vertebrae, taken from the side view here, and you can see a lot of feathering there, rather marked arthritis. It has grown together there; [51] it is bridging over in here and it is bridging over in there; beginning to bridge there; got a good deal of deposit back in there and down here there is a fair amount there, and here it has begun down in the lumbar region the same as I showed you in the first few films. You can see how marked it has increased there, gaping across there; practically grown together. Here, it has increased here, grown almost together there, and there. Now, this is taken of the pelvis. You can see the increase in the feathering, a marked deposit around that joint there and also around this joint, also very marked, how it has grown together on that side, along in here and on this side.

Q. Very well, Doctor. Now, if you will resume the stand.

(Thereupon the witness resumed the witness stand.)

Q. Now, Doctor, I will ask you whether in your opinion and from your study of this patient at any time since the year '35, this patient has gotten any better in his condition?

A. The arthritis has gotten progressively worse. There are times when under treatment that we are able to relieve him of his pain, but it was only [52] temporarily while we are treating him.

(Testimony of Dr. J. H. Patterson.)

Q. What do you give him to relieve him of pain, some of the things?

A. Well, we have given him gold shots and arsenic and various other arthritis preparations and also have given him some pills to relieve his pain, simply just as a reliever. It would not affect his arthritis any, just to make him comfortable.

Q. From your study of this patient will you describe further what pain he does endure and give a picture of it to the jury?

Mr. Hull: If your Honor please, I'd like to ask a question on voir dire first.

Q. Dr. Patterson, you can't determine pain except from what the patient tells you, isn't that true?

A. No, sir; we have this steady condition present and we feel when certain conditions are present we feel it will give pain. That is the closest we can come to it.

Mr. Hull: Then I object to the question.

The Court: All right, the objection is sustained.

Mr. Laney: Q. Then what, in your opinion, then, from your study of the case, what have you to [53] say as to the amount of pain that this patient endures?

Mr. Hull: The same objection.

Mr. Laney: No, that is from his study of the case.

The Court: He wouldn't know, he wouldn't know except what the patient told you about the amount of pain he suffered, would you?

A. Your Honor, just like I said, you can't feel their pain for them, you just know there are certain

(Testimony of Dr. J. H. Patterson.)

conditions present, and in our experience it always does cause pain according to what the patient says. That is the closest we can come to it.

Mr. Laney: What would you say of an arthritic patient of this sort if he endeavored to do any work?

A. Well, it would just irritate the conditions present.

Q. And what about pain?

A. Well, if it irritates the conditions present, that brings about more inflammation there and, naturally, would cause more pain.

Q. If a patient of this sort endeavored to carry on farming or any other activity, what would you say as to whether it would be good for his [54] health or not?

Mr. Hull: Your Honor please, I object to that. We are not trying if it would be good for his health or not. That is outside the point.

Mr. Laney: In regard to that, if it please the Court, the patient does not have—

The Court: Your question was “if he did farm work if it would be good for his health.”

Mr. Laney: Well, I will withdraw that question.

Q. Now, if this patient should engage in any physical work, I will ask you whether in your opinion, it would have any bad effect on his health or cause any pain?

Mr. Hull: Your Honor please, I am going to object to that on the same ground.

Mr. Laney: I will submit that is—

The Court: Not as to his health. The Doctor testi-

(Testimony of Dr. J. H. Patterson.)

fied he had an arthritic condition. All he knows about his health is as far as this record is concerned.

Mr. Laney: Well, if an arthritic patient such as this plaintiff does engage in any physical activity, what is the result on him?

A. It is harmful to him.

Q. In what way? [55]

A. It gives him more pain and aggravates all of his joints that he uses. Sometimes it makes him so sore that they have to go to bed.

Q. I will ask you whether in your opinion this patient would be able to walk around the farm or do any work around the farm.

A. He would not be able to walk very far without having a good deal of pain and aggravation of his symptoms.

Q. I will ask you whether that has been true of this patient ever since he had his trouble in '35?

A. Yes, that has always been his complaint to me, when he attempted to work it made his condition worse and he would always have to come in and take treatments for awhile to quiet it down.

Q. Will you explain a little further to the jury what that feathering and those deposits, and so on, what those are as shown in the X-rays and in this patient?

A. It is an excessive deposit of calcium, over-growth of bone structure there, and when it gets—goes into the joints, of course it makes it very painful for him to try to move it as it is a rough surface, because the joint surfaces are smooth and well lubricated by body fluid. When that rough [56] surface

(Testimony of Dr. J. H. Patterson.)  
goes on there, naturally, it is hard for them to use those joints without a great deal of discomfort.

Q. I will ask you whether in your opinion this patient will ever get any better from this condition?

A. No, the usual procedure is they continue to get worse until they are absolutely helpless in bed.

Q. Then you say his condition is progressing?

A. Yes, sir.

Q. Then, Doctor, if we define total disability as such disability that renders a patient permanently unable to perform substantial and material acts of his occupation, or any other occupation in the usual and customary manner, I will ask you whether in your opinion this patient is totally disabled?

Mr. Hull: If your Honor please, there is no foundation laid for that question and I object to that.

Mr. Laney: That is a definition of it, within the rules of the Court.

The Court: All right, you may answer.

A. Yes, I'd say that he is permanently disabled, completely disabled under that definition.

Mr. Laney: Q. Now, what would you say as to his total disability? [57]

Mr. Hull: The same objection, your Honor.

The Court: He may answer.

A. Well—

Mr. Laney: Under that definition, is he totally disabled?

A. He is totally disabled from doing any work that would be harmful to his health. He could walk around, but it gives him pain if he walks around too much. He can't stay at it too long, but yet he is not

(Testimony of Dr. J. H. Patterson.)

completely helpless so far as lifting his hands and arms, feeding himself and clothing himself, but any of it much, and doing any actual work of any kind, he just can't sustain himself on it.

Mr. Laney: You may take the witness.

Cross-Examination

Mr. Hull:

Q. Dr. Patterson, how long have you known Mr. Hughes personally? A. Oh, since about '14.

Q. He was a patient of your Dad's, was he not?

A. Yes.

Q. And you have been very closely related socially to Mr. Hughes for many years?

A. No, sir, I have just known him since I was [58] a boy but I have never been socially acquainted. I have never been to the man's house.

Q. Have you been out to his ranch in the last few years?

A. I have never been to his ranch.

Q. Then when you stated you don't know how much walking he could do around his ranch, you are referring just to a hypothetical situation, you weren't referring to what you observed, that is right?

A. I don't think I answered it that way, Mr. Hull.

Q. Maybe I misunderstood you. What I am trying to get at, Dr. Patterson, is, and if I am incorrect, you correct me, I want to know whether or not what you said with reference to his ability to walk around the ranch is based on personal observation or was just based on your opinion?

A. It is based upon my professional experience

(Testimony of Dr. J. H. Patterson.)

in taking care of a lot of these arthritics over a period of 20 years.

Q. If it should develop in the evidence in this case that Mr. Hughes does walk around his ranch and does drive a tractor and does do other substantial farm duties, then your opinion would not be worth much weight, would it, Doctor? [59]

A. Yes, I think it would be worth just as much as it was. I would say he has got a lot more guts and is a bigger fool than I thought he was.

Q. You would not dispute those facts if he did do those things, would you?

A. Well, you know, there is a difference in a person's susceptibility to pain. Some of them can stand a lot of pain even though it is harmful to them. Others can't stand very much. If he is able to do things like that, I'd say he would.

Q. Dr. Patterson, that is very interesting, but let me ask you if it is not true that in all cases of arthritis of this type that it is included in the medical practice to recommend to patients that they indulge in a lot of physical exercise?

A. Unless it clears his joints up, it is good for him, but when it makes them sore, it is very harmful to them. Mr. Hughes knows that I have tried that. I have kept him limited and I expect that is the reason he is able to get about as well as he is, because we try to keep him going as much as he can without subjecting him, and without creating too much injury to those joints, and too much irritation to them.

Q. You told him to exercise? [60]

A. If he could without harming or hurting him.

(Testimony of Dr. J. H. Patterson.)

Q. How did you determine how much would harm him and how much would hurt him?

A. It may be he would get pain and it may be he would get a little more exercise, and usually I would recommend diathermy there.

Q. Doctor, on how many occasions have you included diathermy treatments for him?

A. Well, according to what my records show.

Q. Would you like to get those records?

A. Might I?

Q. Let me ask you if it is not a fact that during the year 1941, the year prior to the time that this insurance company cut him off, if he only came to your office three times, one in January, one in July, and one in November?

A. Yes, I told him not to come any more than he had to because there is no use running up big bills, because the treatments were not doing him any good, because he comes in when he has so much pain, and he comes in and gets some diathermy treatments.

Q. When you say "he gets so much pain", you are testifying entirely to what he told you?

A. That is absolutely a fact.

Q. Then if he is not telling you the truth and [61] the whole truth, you are absolutely at a loss—

A. No, I believe a man if he has a condition like this, it is always the experience of the doctor in these cases that it causes pain. Doctors who have that condition themselves know they have pain. They have patients they can trust and they know these conditions, when they are present, they cause pain. That is all.

(Testimony of Dr. J. H. Patterson.)

Q. Dr. Patterson, isn't it true that one of the conditions that you pointed out to this jury on the X-ray was an atrophied condition due to the fact that Mr. Hughes has not properly exercised that particular joint?

A. No, I said he was unable to exercise these because they harm him too much, gave him too much pain.

Q. When you say "harm", you mean only pain?

A. Well, when you have pain arising, you have that pain because you have irritation. You get irritation from movement, and that causes irritation.

Q. That is not the question though, Doctor, that I asked you.

A. Well, I am trying to explain it to you; you asked me to explain it to you, that is what you asked for. [62]

Q. All right.

A. That is the loss of calcium in the bones of the hand that I brought out there, that I mentioned on the X-rays.

Q. Dr. Patterson, how many times have you seen this patient professionally this year,

A. Oh, I think about two, three or four times.

Q. How many of those times has he been in in the last two weeks?

A. Well, it has only been one time in the last two weeks.

Q. He was in your office yesterday, wasn't he?

A. Yes, sir.

Q. And the day before?

A. I don't know; I didn't see him; I don't remem-

(Testimony of Dr. J. H. Patterson.)

ber seeing him; he might have been there. I don't know.

Q. What did you prescribe for this patient?

A. You mean over the period of years I have been taking care of him?

Q. Yes.

A. Well, I have given him all kinds of arthritic shots, arsenic shots, gold shots, giving him relief of pain, I have given him diathermy.

Q. And he kept getting worse? A. Yes.

Q. You found him in good physical condition aside from the arthritis?

A. We have been unable to find anything else wrong with him other than arthritis. Of course, that is enough, it is more than I would want.

Mr. Hull: I move that the answer be stricken.

The Court: It may be.

Mr. Hull: You found him organically sound for his age, didn't you? A. Yes.

Q. Found him to be an active man, did you?

A. Yes, sir.

Q. That is, he was mentally alert?

A. Yes, sir.

Q. And you made several physical examinations to determine those things, didn't you?

A. Yes.

Q. Isn't it true, speaking of these arthritic patients that you have been talking about, that walking and exercising is beneficial because it keeps the rough edges off, the spurring of those joints?

A. I think I have answered that question several times.

Mr. Hull: That is all, Doctor.

Mr. Laney: That is all. May this witness be [64] excused?

The Court: Yes. We will have our afternoon recess. Keep in mind the Court's admonition during the recess.

(Thereupon a recess was taken.)

(After recess, all parties as heretofore noted by the Clerk's record being present, the trial resumed as follows):

**THOMAS J. HUGHES**

resumed the witness stand and having been theretofore duly sworn, testified as follows:

**Direct Examination (Resumed)**

Mr. Laney:

Q. Mr. Hughes, you had identified and was introduced in evidence Plaintiff's Exhibit 7, being a letter of June 27th, 1942, in which you said you made the first payment under protest and why you protested. Now, I will call your attention to six checks and ask you if those are the checks for the annual premium that you paid on the date each check bears for the years that they show, that is, '42 up to and including '47?

A. These are the checks of \$228, premium due each year.

Q. I will ask you whether, when you sent each one in, you did it under protest and referred to the protest and letter, the letter of June 27th, 1942, which is in evidence as Plaintiff's Exhibit 7?

A. Yes, that is right.

(Testimony of Thomas J. Hughes.)

Mr. Laney: I will offer these checks in evidence, may it please the Court.

Mr. Hull: I have no objection.

Mr. Laney: May I put the seven checks just in the envelope together?

The Court: They may be received.

(Thereupon the documents were marked as Plaintiff's Exhibit 11 in evidence.)

Q. (By Mr. Laney), Now, Mr. Hughes, from the time in '35, when the Company as is shown in the evidence, first admitted you were disabled under the policy and they paid it, you say up until the payment—

Mr. Hull: Your Honor please, I object to this question, we think—

Mr. Laney: It was preliminary; I will withdraw it.

Q. You say they did pay you up to January, 1942?

A. They paid the—

Q. Monthly benefit?

A. Monthly benefits until January 1st, '42.

Q. Now, I will ask you whether you have gotten [66] any better or whether you have gotten worse since they first started paying them there in '35?

A. Oh, it has just extended all over my system, arms and everywhere.

Q. I will ask you this, then, whether it has gotten better or gotten worse. A. A whole lot worse.

Q. Now, I will ask you whether up to the time when you filed your suit in this case, whether it had progressed and got better or whether it got worse?

(Testimony of Thomas J. Hughes.)

A. Got worse.

Q. Now, during all of that time from '35 on to the present time, have you been able to do any work?

A. No work whatever.

Q. Now, I will ask you whether at times you have tried to work?

A. Oh, yes, several different times.

Q. What have you tried to do?

A. Well, I tried to drive a tractor once and tried to do different things, and just so much pain put me down, put me to bed.

Q. About how many times if you remember, have you tried to drive a tractor?

A. Well, not very many times. I, of course— [67] it is hard to remember back six years, but it wouldn't be very many times altogether because I wasn't able to, had too much pain.

Q. And what effect did it have on you when you tried to drive a tractor?

A. Well, so much that I just—I had to go to bed, lie down, and lots of time I'd lie down in the field while I was out in the field.

Q. And I will ask you whether you recall one occurrence of trying to teach a Mexican boy or show him how to drive a tractor, or some boy how to drive a tractor?

A. Oh, yes, I got clear down that time, I had to go to bed for three or four days.

Q. What was done to you as a result of this, what did they have to do that night?

A. I don't quite understand the question.

(Testimony of Thomas J. Hughes.)

Q. Well, when you tried to drive the tractor what effect did it have on you that night?

A. It had the effect on me, I had so much pain that I couldn't do—I had to go into the house.

Q. And what did anyone do to you for the pain?

A. Well, my wife put on that electric pad and gave me different kinds of aspirin and some other different kinds of pills they take for pain.

Q. And could you sleep? [68]

A. Couldn't sleep at night, many nights, never slept at all.

Q. Now, before you became ill and before '35 some time, what did you do, just in a general way?

A. Well, I ran a ranch over there and I had a hay bailer, I had my own hay, I had my own harvesting and thrashing machine, I did all of that kind of work and any kind of work to do, irrigating, plowing, or any kind of ranch work there was to do.

Q. Well, since you applied for your total disability benefits there in '35, have you been able to do any of that? A. None at all, none whatever.

Q. And I will ask you if you do drive an automobile at times?

A. I do drive a pickup sometimes and sometimes I drive my other car, I go to church Sundays, but very little. I never drive to Phoenix hardly any more. This arm got so bad, pretty near lost the use of it (indicating left arm).

Q. I will ask you whether that has been true ever since '35?

(Testimony of Thomas J. Hughes.)

A. Yes, and it is bothering both arms and both hips.

Q. How about your back?

A. Well, in the back it has been awfully bad. [69]  
It just bothers all over now.

Q. How about your feet and your ankles?

Mr. Hull: Your Honor, I object to leading the witness.

A. My feet and ankles is in pretty bad fix especially when I walk, move and walk, starting down, I can't go any higher.

Q. Well, now, driving a car, are you always able to drive a car?

A. Not always. I can't use that arm at all.

Q. You are speaking of your left arm?

A. Yes.

Q. How about your ability to write or do anything that requires any job that requires sitting and writing?

A. Well, it hurts in my shoulder up here and forearm here.

Q. Well, can you sit still for any great length of time?

A. Well, not very well, sit still too long, I get pretty stiff and goes to paining and hard for me to get about.

Q. Go ahead, tell the jury a little bit further about to what extent this pains you, just tell them exactly what the facts are.

A. The pain is so bad—any of you ever had a [70] toothache? There is no comparison to what this pain

(Testimony of Thomas J. Hughes.)

is, and it bothers me whenever I walk or move, and sometimes when I am—even now, sitting still now, it would not be so bad, but the minute I start to move it starts to pain. I raise my arm up (indicating). Now it is pain. That is as far as I can go up with. The shoulder pains when I move this arm, and the pain in my knees and ankles when I walk.

Q. And whenever you attempt to do any work that requires any physical effort, what effect has it on the way of pain—in the way of pain?

A. It has effect—I just have to take a lot of stuff for pain. Sometimes lie down, go to bed.

Q. Now, who runs your ranch now?

A. I have my foreman that runs it, working foreman, and he is the one that has been with me from, well, ever since the time I got hurt.

Q. What is his name?

A. His name is Manuel Vieremontez.

Q. And he manages and runs the ranch?

A. Well, he does all of the work, looking after the ranch, outside, everything.

Q. Now, Mr. Hughes, I believe you are a member of the Council of the Salt River Valley Water Users' Association? [71] A. Yes, I am.

Q. How often do you have meetings ordinarily?

A. Well, as a general thing we have what we call a quarterly meeting. That would be about four meetings a year, and in some instances we have what we call a special meeting, and, I don't know, sometimes we might have one—

(Testimony of Thomas J. Hughes.)

Q. Were you on the Council long before you got hurt?

A. I have been on the Council for the Salt River Valley Water Users' before I got hurt for several years.

Q. Then I will ask you whether you are on the School Board, your local School Board there?

A. Yes, I am.

Q. And where do you usually have meetings?

A. Well, we have them over at my home lots of times, and sometimes we have them at the school, not very often.

Q. Why do they have them at your home?

A. Well, lots of times I am not able to go over there.

Q. And when you do go over, do you always drive your own car or not?

A. No, sometimes some of the boys drive for me.

Q. And when you are obliged to attend a meeting [72] of the Council of the Water Users' Association, do you always drive your own car there?

A. No, sometimes I come with the members of the Council that live over in Mesa, and sometimes other parties. Some of my neighbors there come and other times I would come as far as Tempe in the pickup and come over on one of the busses.

Q. Now, Mr. Hughes, in the course of the management of your ranch and before you were disabled, explain a little further what you did. Did you go out in the fields—what did you do?

(Testimony of Thomas J. Hughes.)

A. Well, I just done all kinds of work on the ranch and went through the fields and irrigated the alfalfa and wheat, and just done all kinds of work that a farmer would do. I could do a whole lot of it even then, oh, many years ago.

Q. Are you able to do any of that work now?

A. No, I can't do it now.

Q. Before you were disabled what did you do, if anything, in the way of repairing your own machinery there?

A. Yes, I used to repair a whole lot of the machinery, the harvester and the bailer.

Q. Are you able to do any of that now?

A. No.

Q. Are you able to walk out in the fields and [73] direct the Mexicans or the hired hands?

A. Well, I haven't been out in the fields for a long time. I don't do that at all. I just depend on my men. I am not able to do it.

Q. Before you were disabled did you used to do any milking?

A. Yes, we did. I milked several cows.

Q. Are you able to do any of that now?

A. No.

Q. Or have you been since '35?

A. None whatever.

Q. Who do you have to attend to the dairy herd?

A. I have a regular man that looks after the dairy herd and does all of the milking.

Mr. Laney: You may take the witness.

(Testimony of Thomas J. Hughes.)

Cross-Examination

Mr. Hull:

Q. Mr. Hughes, what was your occupation back in '35 when you fell on the place and injured your back?

A. My occupation was a farmer. I was right there at my own home.

Q. Your occupation was that of a farmer and that of supervision of farms, isn't that true?

A. Well, I was just an ordinary farmer living on that ranch running it. I don't know what you call it.

Mr. Hull: I'd like to have this marked for identification, please.

(The document was marked as Defendant's Exhibit A for identification.)

Q. (By Mr. Hull): Your principal duties were supervising farms at that time, were they not?

A. I done everything.

Q. Didn't you supervise and look after the running of a ranch and have hired men and milkers and other sorts of ranch hands to do the actual physical work on the ranch?

A. I had one man to help me run the ranch, just help me do the work, do the milking and driving tractors, and everything else.

Q. I want to hand you for identification Defendant's Exhibit A, and I will ask you if you signed that? That bears your signature—I am just asking you about your signature, Mr. Hughes. You can read it if you'd like to.

(Testimony of Thomas J. Hughes.)

A. Yes, that is my signature.

Q. Did you fill in those blanks—is that your handwriting in there?

A. Which are you asking about now? Any special one of these? [75]

Q. No, I want to know if that is in your handwriting, that document.

A. Well, I think it is, I mean I know it is, that signature.

Q. Very well (taking document from the witness).

A. All right—just a minute. Are you ready for this?

Mr. Hull: What did you say, Mr. Hughes?

Mr. Laney: He asked you if you are ready for it. You asked about it and he said, "Just a minute."

A. I think every bit of the writing on that, I think I wrote that with the exception of this, and if I remember correctly on that, that supervision of the farm, it has been quite awhile ago, but I was just hurting to doggone bad I read that over and I think my wife's cousin either wrote some of that in, it is right there, I believe, I am not sure, but the rest of the writing is mine.

Mr. Laney: Is that offered in evidence?

Mr. Hull: No, this is your case, Mr. Laney. I am cross-examining your witness.

Q. You were born and raised on the farm, Mr. Hughes? A. Yes, sir.

Q. You have been a farmer all of your life, [76] haven't you?

(Testimony of Thomas J. Hughes.)

A. Well, I have been a farmer most of my life but not all of it. As I told you some time ago, that I worked some at the mines and different places, but I still was living on the farm when I was younger.

Q. You were born on a farm in Kansas, weren't you? A. Yes.

Q. And you were engaged with regular farm work back there in Kansas as a boy?

A. Oh, yes.

Q. So your principal occupation during your entire life has been farm work, related to agriculture, isn't that true?

A. Well, a good deal of it, you might say.

Q. Now, in addition to that you have had the equivalent of four years college education, haven't you?

A. Well, I had, I don't know whether—yes, I expect you would, but some of it was, in them days we didn't have a high school, we just had a teachers college or a normal school, and I think that I spent either three or four years in both of those schools together.

Q. Did you get a teacher's certificate or [77] degree? A. No.

Q. But you spent a couple of years in a normal school at Kansas State and a couple in Arizona, isn't that right? A. Yes.

Q. And what were you majoring in in that study? Were you trying to fit yourself to be a teacher?

A. Well, I—when I first started to college I wanted to be—studied to be a teacher.

(Testimony of Thomas J. Hughes.)

Q. Have you ever done any teaching?

A. No, I have not.

Q. You are at the present time president of the rural school, No. 13, Maricopa County?

A. Yes, I am.

Q. How long have you been on that school board?

A. Well, I don't know. I think just about as long as I been on the water Users'.

Q. 16 years?

A. Well, I'd have to look up the records, but I think it is a long time.

Q. Goes back prior to '35, isn't that true?

A. Oh, I think so.

Q. Now, you attended board meetings, did you not, on that school board?

A. I did when I could. Sometimes I couldn't [78] attend them over at the school house, and we have board meetings at my home.

Q. Do you recall since '41, starting with '42 up until January of this year, whether or not you missed any meetings of the school board during that entire period?

A. I didn't get the last part of that, Mr. Hull.

Mr. Hull: Would you read that, please, Mr. Reporter?

(The last question was read by the reporter.)

A. Well, I don't remember whether I did or not, and—

Q. (By Mr. Hull): Do you recall missing many meetings, or missing meetings frequently when called upon?

(Testimony of Thomas J. Hughes.)

A. Well, in case they have meetings over at my home when they want to have them. I am not able to come—

Q. It is true, then, that so far as you know, you have attended at least the majority of the meetings on that school board, is that right?

A. Well, to some of them I know I didn't attend, but I couldn't tell you whether I attended the majority of them, so I don't remember.

Q. When does your term expire?

A. I think it is two years yet, one or two years. I don't remember it. [79]

Q. Now, in your capacity as a member of the Rural School Board No. 13 of this County, you have passed upon such matters as the budget for the school district? A. Yes.

Q. You have done that each year you have served on the board, is that right?

A. I don't think I missed any of them—no, I don't think I missed any of them, but sometimes we passed on that budget they would come over at my home and sometimes we have it down at the principal's home down at Tempe.

Q. But you do pass upon the budget each year?

A. The Board does.

Q. You are a member of that Board?

A. Yes.

Q. And the President? A. Yes.

Q. How many members are there on that Board?

A. There is two more.

Q. How many schools are there in your district?

(Testimony of Thomas J. Hughes.)

A. Just two.

Q. How about Rural School No. 13, how many children do you have there, do you know?

A. I couldn't recall just now what we have there.

Q. About 175, would you say?

A. Well, there is over a hundred, I don't know how many over a hundred.

Q. Do you know how many teachers you have there?

A. No, I don't just exactly. I couldn't tell you.

Q. Would you say a half dozen or more?

A. Yes, I think more than that.

Q. The other school in that district is the Guadalupe School? A. Yes, it is.

Q. How many children do you have in that?

A. We have about as many over there as we have in the other school.

Q. Isn't a fact you have twice as many children than you have a Guadalupe?

A. Well, we might have. I made no check of it and we won't until we make the budget, and we will know.

Q. When do you make a budget?

A. Well, it will be along later in the spring for next year's budget.

Q. What do you put in the budget when you prepare this budget?

A. Well, we put in all of the teachers' salaries, expense of operation of the school, [81] maintenance and expenses, and everything of that sort.

(Testimony of Thomas J. Hughes.)

Q. You put in there all of the money that you expect to spend for the next year?

A. Next year, yes.

Q. Do you put in there any receipts that you expect to get from any source by way of revenue to offset your anticipated expenses?

A. I don't think we have been getting anything except our expenses.

Q. Now, at the present time you are building—your school board is building an addition to the Guadalupe School, is that right?

A. Well, they have to do it some time but I don't know whether they got it going or not. I haven't been over there for some time.

Q. How long ago did the School Board purchase this building for the Guadalupe School?

A. They never purchased that building for the Guadalupe School.

Q. Do you have it under lease? A. Yes.

Q. Who is the owner of the land from whom the School Board leases that school?

A. The land with the building belongs to a lady in Tempe by the name of Mrs. Roberts. [82]

Q. Do you know what type of lease the School Board has on that particular building?

A. Well, no, I don't. What do you mean, Mr. Hull?

Q. I mean what kind of lease; how long a lease?

A. Well, I think we have got a kind of long term lease on it. I don't know the expiration of it or how long it runs.

(Testimony of Thomas J. Hughes.)

Q. When did the School Board take that lease; the last lease?

A. Well, I think it was probably a year or more ago. You see that building belonged to a Mexican man over there and Miss Roberts bought that building and we leased it from her. I don't just remember the date of that lease.

Q. You, and I mean now the School Board, leased from this Mexican prior to the time that the lease was taken with this Mrs. Roberts?

A. Yes, we did.

Q. With a man by the name of Joe Soleris?

A. Yes, that is the boy.

Q. You, yourself, as a member of the Board, entered into negotiations leading up to the taking of this lease, did you not?

A. The Board passed on the leasing of the building from Miss Roberts, but I think before that [83] time it was just an out-and-out lease. I don't remember what the lady there had in mind about the old place, I don't remember seeing it.

Q. What I mean, Mr. Hughes, is you, yourself, discussed the terms of the lease and the terms and the arrangements that would be made for this building?

A. Well, the Board discussed it there together. It wasn't up to me what to do.

Q. In the building of this new addition to the school, you have employed a contractor for that job, have you not, is that right?

A. Well, the other members of the Board, I guess,

(Testimony of Thomas J. Hughes.)

done that. I don't know just whether they had a contractor on that or not, or whether it is day work.

Q. Well, if any contract was signed, was it brought to your attention?

A. Well, they might have passed it up if I hadn't been there at the meeting, the last meetings that they had just before that. I don't remember. I don't know of a contract for that building. I don't know whether it is put on there by day or whether it is just an out-and-out price for doing the work.

Q. But you do remember that the School Board was engaged in a program for building that addition to that school, isn't that true, the School Board of which you are a member?

A. Well, I don't know so much about this last one, but the others, I do. This last building you are talking about, I can't tell you about that. I don't know.

Q. Well, when were those other additions put in there that you are talking about?

A. Oh, the other one we built it at different times. I don't know just what times they were.

Q. Were you consulted on the arrangements for the construction of the additions, Mr. Hughes?

A. No, I don't think so—you mean this last one?

Q. No, I am talking about the other ones that you just mentioned.

A. Well, I don't remember so much about those. It is just an addition built on. I think the whole board passed on the whole thing in one meeting for those things.

(Testimony of Thomas J. Hughes.)

Q. You attended that meeting, didn't you?

A. Yes, and I think it was over at my home, the last meeting we had about that.

Q. Who presides at the meetings of the Rural School Board No. 13 when you had those meetings? [85]

A. Well, just the three of us there and we are all three trustees.

Who was the chairman on those occasions?

A. Well, it depends on who the President is. They have been changed out there sometimes.

Q. Well, you are the President now?

A. Yes, but I haven't been all the time.

Q. Over the last six or eight years have you been the President most of the time of that School Board?

A. Well, I don't think it would go back eight years. I think probably, oh, about for that many. I am not sure, I can't tell you, Mr. Hull.

Q. What, in addition to the things that we talked about, like the preparation of the budget and the matters of additions to the schools and the leasing of buildings, does the School Board do over there; what other activities does it engage in?

A. Well, not very much that I know of.

Q. Well, do you hire and fire teachers?

A. No, we don't, we have a principal that looks after that.

Q. What do you do about consulting the policies of the School Board now with reference to the policies as to hiring or firing teachers? [86]

A. I think we leave that up to the Superintendent

(Testimony of Thomas J. Hughes.)

and put the responsibility on the lady that is the Superintendent.

Q. And who consults with the Superintendent?

A. The School Board.

Q. Now, how many school busses do you operate over there?      A. We operate two.

Q. How long ago has it been since you acquired the second bus?

A. Oh, we have had a second bus, two busses on there for the last, oh, I think four or five years, probably, as near as I can remember.

Q. Are you at the present time, and I am again referring to the School Board, negotiating for the purchase of a new International school bus, another one to supplement the two you have?

A. No, they have already bought one a long time ago, got it in operation.

Q. Who attends to the hiring or firing of these bus drivers?      A. The principal of the school.

Q. You leave that up to him?      A. Yes.

Q. When you have these meetings of the School Board, does the principal attend, the principals [87] of the two schools, I mean?

A. You mean the superintendent, the principal?

Q. Yes.

A. Yes, pretty near all the time they attend, I am pretty sure, unless it is something out of the ordinary that they might bring up.

Q. Does he keep the School Board informed on the matters within his sphere of operations and the operations of those schools?

(Testimony of Thomas J. Hughes.)

A. Well, if they want to do anything in the way of remodeling or building, they call the School Board out to go and take it up with the school teacher before they done anything.

Q. So the School Board ultimately desides the policies of things like that?

A. Well, I think they would, yes.

Q. Does the School Board keep written minutes of the meetings?

A. Yes, we have those written minutes and I think they have a book on those minutes. I think the principal has them there on the different meetings that we have and the minutes of the meetings.

Q. Well, do you, as President of the School Board, sign those minutes as chairman of the meetings? [88]

A. Well, I think probably I signed some of them, but I don't remember we had very many of those meetings where we had minutes signed that way.

Q. Now, who signs the vouchers for the expenditures of the Rural School District No. 13?

A. The Board of Trustees.

Q. Isn't it true that your personal signature has to be on all of those checks?

A. Yes, it is unless I am away from home, I can't be found—oh, you mean the vouchers?

Q. Yes.

A. The trustees sign the vouchers, sometimes there is three of them and sometimes two. If they happen to be one away, why, two signatures are on there.

(Testimony of Thomas J. Hughes.)

Q. But you put your signature on there as a member of the Board? A. Oh, yes, yes.

Q. What do those vouchers represent, generally speaking, in the way of expenditures?

A. They represent money to buy supplies and books, pay teachers' salaries and gasoline for the busses and general expenses of operation.

Q. Do they run in rather sizeable amounts, in dollars, per voucher, I mean; do they run up into big figures? [89]

A. Well, not so very large. Salaries on teachers are put on a separate voucher, I think, and then separate vouchers for the expenses or material furnished—for stuff that we purchase.

Q. But they will average up to around four or five hundred dollars, won't they, per voucher, on the average? A. How many?

Q. Four to five hundred dollars per voucher?

A. Oh, I think some of them would run higher than that, I am not sure. I couldn't give you a correct answer.

Q. Very well. You have a secretary for the Rural School Board No. 13?

A. We have a lady that keeps all of the books and everything.

Q. Do you, from time to time, consult with her with reference to these books and records to see if they are in shape?

A. Well, not so very much. We do look over the vouchers and see that they—the bills is on there that the voucher represents to pay.

(Testimony of Thomas J. Hughes.)

Q. You check the vouchers then against—

A. Well, the Board generally checks those when they bring the vouchers around to sign them, generally for bills, expense, electricity and all [90] of the regular expenditures.

Q. How many acres of irrigated land do you own in the Salt River Valley at the present time?

A. I own 412 acres.

Q. And where are those acres located with reference to the City of Phoenix?

A. With reference to what?

Q. The City of Phoenix where we are now.

A. Well, it is south and east of Tempe. It would be a better description three and one-half miles southeast of Tempe, or about 13 miles, I'd say, or 12, from southeast—from Phoenix.

Q. Then it lies much closer to Tempe than it is to Phoenix? A. Oh, yes.

Q. Now, is that land divided up so that a part of it we could call your home ranch and the other part by some other terms? Do you use those terms in referring to your ranch?

A. Well, those ranches were bought from different people, and all of the ranch on the south side of the main canal that runs through there, we call that the Meyers Ranch.

Q. Well, how long have you lived on that ranch?

A. I have lived there continuously from '17; that is, the early part of the year. [91]

Q. During all of that time has the land been cultivated?

(Testimony of Thomas J. Hughes.)

A. Yes, sure, it has been cultivated.

Q. And what crops have been raised on that land over there?

A. Well, there has been all kinds of crops, different crops at different times. One time it was all in cotton, the whole ranch, and other times it was in wheat or barley and different crops, and then it has been leased out for vegetables and different things like that.

Q. Well, in the past six years have you been directly engaged in the raising of grain and alfalfa?

A. The past how many years?

Q. Six years.

A. We raised some grain, but mostly alfalfa, because we have a dairy herd there that you can feed on that stuff.

Q. You have dairy cows there, don't you?

A. Yes, we do.

Q. And what grains do you raise on the ranch?

A. Well, you have to ask me in what year. I don't know. This last year we had barley and I think the year before barley, and on the rest that we had there was in alfalfa. [92]

Q. Let's get at it this way, then. You raised barley every year for the past ten or twelve years?

A. I think there was some years we didn't have any barley at all, if I remember correctly.

Q. Well, you would say that primarily your crops out there are alfalfa and barley?

A. Well, it has been for the last two or three years there has been alfalfa and barley, but that is the land that we have the dairy on, but the land that is leased out to the lettuce companies, they change it

(Testimony of Thomas J. Hughes.)

around and put in honeydews and lettuce, and different stuff in there.

Q. Then you lease land out in addition to raising crops on a part of the ranch, is that correct?

A. Yes, 185 acres that is leased to the Hilvert Lettuce Company.

Q. I am just talking about these 160 acres that you mentioned first. For the last three years, then, your crops have been primarily alfalfa and barley, if I understand you correctly, is that right, Mr. Hughes? A. You didn't state just which—

Q. Well, I mean the home ranch where you live, your main crops the last three years, didn't you say were barley and alfalfa?

A. Well, I think so. On barley, well, there [93] was one year I believe we had wheat sometimes three or four years ago, but I can't remember back just what was in it, but some was in grain and some in alfalfa.

Q. Well, since '35, have you raised any crops on the ranch different from the type of crops that were being raised on the ranch prior to the time you got arthritis?

A. Well, we have never raised anything there, I don't think, but we have raised wheat and barley and alfalfa, I think, if I remember correctly.

Q. How many cows are included in your dairy?

A. Oh, I think there is about 60 that they milk, 55 or 60.

Q. Sixty cows that you milk?

A. Fifty-five or 60, somewhere along there.

Q. Is that an increase or decrease over the num-

(Testimony of Thomas J. Hughes.)

ber of head of cows on the ranch, milk cows, before you had arthritis?

A. Well, I think it has increased, I am pretty sure it has.

Q. Well, about 15 or 20 head?

A. Well, I should say about that, probably more. I don't just remember what we had there at the time.

Q. Now, do you employ a man to milk the cows?

A. Yes, I do.

Q. His name is Virgil Patterson?

A. Well, Virgil Patterson is not working for us any more. He went down to visit some of his people down in Oklahoma. He has gone for some time.

Q. During all the time that you have lived on this ranch out there, have you hired someone to milk the cows?

A. Yes, I have.

Q. What do you pay the man who attends to the milking of the cows?

A. The man that milks the cows, he gets \$150 a month regardless of how many cows he milks, and he gets three dollars extra for every cow over 50 cows.

Q. And then in addition to that he gets his house, his lights and his milk, milk for his entire family, is that right?

A. I think so; I think so.

Q. Who pays him this \$150 a month for his services?

A. Sometimes I pay him and sometimes my wife pays him.

Q. You pay him by check, don't you?

A. Yes, mostly by check. I think pretty near [95] all the time by check.

(Testimony of Thomas J. Hughes.)

Q. Drawn upon accounts in what bank?

A. Well, sometimes it is on the Valley Bank here, but not very often: mostly on the Tempe Bank.

Q. You have an account, then, in the Valley Bank, is that right? A. Yes.

Q. In Phoenix? A. Yes.

Q. Is that your personal checking account?

A. Well, it is just an account where I got the money. Nobody's check is recognized there, only mine. Well, it is our own money, belongs to the community property.

Q. Who pays the man who milks the cows for this three dollars extra per head for cows above 50 that are milked?

A. Well, that is paid him every two weeks. Sometimes my wife will pay him. sometimes I will pay him.

Q. Who makes the accounting to determine whether or not the man has milked cows above 50?

A. Well, he turns it in himself.

Q. Who does he turn it in to?

A. He turns it in there to me or to my wife and says how many cows he has over 50 cows. [96]

Q. Then in instances where they turn it over to you, do you check it to see whether or not—

A. No, I never bother about it.

Q. You take his word for it?

A. I just take his word for it.

Q. You have milking machines on the ranch, haven't you? A. Yes, we have.

Q. How many do you have?

A. We have three.

(Testimony of Thomas J. Hughes.)

Q. Did you at any time, Mr. Hughes, personally do any milking on the ranch yourself; did you ever milk cows on your ranch? A. Personally?

Q. Yes.

A. You mean with milking machines or by hand?

Q. I don't mean that, no.

A. What do you mean?

Q. I mean did you ever personally milk cows on that ranch?

A. Well, before I got hurt I used to milk them all the time.

Q. You did?

A. Yes. That is, I had a man helping me and we milked them by hand.

Q. When did you buy the milking machines?

A. Oh, I don't remember. We have had them in quite awhile. We bought two sets of milking machines. We bought a DeLaval, and that wasn't satisfactory and we didn't keep them, and then we put in a Surge machine.

Q. Well, do you mean, Mr. Hughes, that at one time you actually did the milking?

A. I did the milking before I got hurt. I had a man helping me. We used to work in the fields and then milk so many cows.

Q. Even before you had arthritis you merely assisted in the milking, is that right; you assisted the man that did the milking, rather than do it yourself, isn't that true?

A. I think I done it myself and the man helped me, I think that is the way it was.

Q. I'd like to ask you a question about your

(Testimony of Thomas J. Hughes.)

deposition. Now, Mr. Hughes, do you recall the event of taking your deposition in my office on July 24th of this year? A. Yes.

Q. Now, I am going to call your attention to some questions which appear on pages 36 and 37 of the deposition, and I will ask you first if at that time you were sworn to tell the truth and the whole truth, and nothing but the truth, were you? [98]

A. Yes.

Q. Now, on that occasion, I'd like to ask you if you were asked these questions and if you gave these answers: Now, if you will just listen, please, I will start to read from line 17 on page 36: "Question: Mr. Hughes, you have been milking your home cow, haven't you, the milk for your house? Answer: No, I get that from the milking machines. Question: Didn't you milk a cow for the milk for your home up until the last year or two, say? Answer: No, I don't remember of ever having milked any cows. I think they—the milkers we have, my wife generally told them what cow they wanted milked for the house. We had some Jerseys and Guernseys, and finally they would bring in whatever milk she would want from a certain cow, whether it is Jersey or Guernsey or Holstein. The milk was too rich from the Guernsey, we don't have any Guernseys or Jerseys now. Question: Did you, yourself, ever do any milking on the ranch? Answer: No, I never done anything, only before I got hurt I used to help the man with the milking, but after I got hurt I have never been able to do anything at all in the way of milk-

(Testimony of Thomas J. Hughes.)

ing." Now, I am asking did you so testify on that occasion?

A. Well, if you got it that way, I think you [99] got that wrong.

Q. I haven't, I am not asking you if I have it that way, Mr. Hughes. Let me have the original deposition so I can show it to the witness. I am reading from line 17 of page 36, to and including line 10 on page 37.

A. What time do you go back to in this thing? Are you asking a question before I got hurt or after that?

Q. Well, I am asking if you have testified as I have read it there.

A. You asked this question: "Did you, yourself, ever do any milking on the ranch?"

Q. That is right.

A. Now, I just told you a little while ago that before I got hurt, I was under the impression that you wanted to know if I did any milking on the ranch since I got this accident, but before this accident, before I got hurt, I milked cows right along on the ranch and had a man help me.

Q. Mr. Hughes, just let me ask this question—

Mr. Laney: Oh, we will stipulate that is what he said. We object to it because that is not impeaching anything. He says—it is just quibbling over—

The Court: You stipulate that was the answer?

Mr. Hull: Very well, I'd like to ask you, Mr. Hughes, you signed this deposition, did you not?

A. Yes, sir, I did.

Q. Well, you read it over before you signed it?

(Testimony of Thomas J. Hughes.)

A. Well, I read it over but I should have gone over it again, I should have if there is any errors in it, because I am not here to give you any information only the facts what you want.

Q. Mr. Hughes, you made some corrections in it before you signed it?

A. Yes, I did. I probably ought to have made some more in it.

Q. How long has Manuel Viermontez been your foreman down there?

A. Manuel has been working for me before the time I got arthritis.

Q. Was he the foreman before you got arthritis?

A. No, he was not. He just—I was looking after the ranch myself and he worked there for me.

Q. Are you paying him more now than you did at that time? A. Oh, sure, a whole lot more.

Q. Have his duties increased as time has gone by?

A. Well, the cost of living has gone up and the man is entitled to more pay. [101]

Q. How much does he earn at the present time?

A. Well, some weeks I think probably would be \$50 a week and other weeks might be a little less. I couldn't recall just the amount. He turns in his own time and I pay it, or my wife, pays it.

Q. You pay that by check too? A. Yes.

Q. Now, in addition to the salary that you pay him you also allow him the use of the house and for lights, water and milk for himself and family, is that right? A. Yes, without any charge.

Q. Has Manuel Viermontez been with you during

(Testimony of Thomas J. Hughes.)

all of this time continuously, without interruption?

A. Oh, yes, yes.

Q. Now, you consult with your foreman from time to time with regard to ranch policies, don't you?

A. I don't consult with him very much, because he goes right along and runs the ranch just the same as if I wasn't there. He knows what to do. He might change some of the fields and plant a different crop, and I tell him if he wants to change those fields and plant different crops in it, why, change them.

Q. In July of this year, '48, you and your [102] wife took an automobile trip to Santa Ana, California, didn't you?

A. No, my wife went over there, and daughter, and later my son and I went over, the one that is a doctor.

Q. You drove over in an automobile, didn't you?

A. No, I rode, I didn't drive. I never drove an inch of the way.

Q. I mean you rode over in an automobile?

A. Yes, I did.

Q. How long did it take you to drive over there?

A. Well, I think that we drove over probably, I think in one day, if I remember correctly.

Q. And you drove back?

A. No, I didn't drive at all.

Q. I mean you came back in the automobile?

A. Yes, I did.

Q. You were a passenger in the automobile, weren't you, coming back?

A. My son was driving. It was his car. I wasn't paying any fare.

(Testimony of Thomas J. Hughes.)

Q. Did you stop and rest on that trip either going to Santa Ana, California, or coming back?

A. How is that?

Q. Did you stop to rest during that trip going [103] either way?

A. We stopped quite a little while in Blythe, over here.

Q. Was that for meals? A. Huh?

Q. For a meal, for eating purposes?

A. Well, we stopped to rest there some and we got lunch before we left. I don't remember how long we stopped.

Q. Now, you came back after you had been over there a short time, isn't that true?

A. I come back—I stayed there about a week, I think.

Q. Didn't you come back because you felt that Manuel Viermontez and the milker could not operate the ranch without you being there?

A. No, I come back because I was hurting awful bad with arthritis. It was just bothering me so much over there I couldn't stand to stay over there, and I had this home leased over there for a couple of months, and I couldn't go back, I wouldn't go back because I had too much pain.

Q. Did you ever tell anybody here in Arizona when you came back that you returned early because you could not trust these two people?

A. No, I didn't, never told nobody. [104]

Q. Did you go directly to the ranch when you came back from this trip?

A. Yes, we went directly home.

(Testimony of Thomas J. Hughes.)

Q. Did you check to see what had been done on the ranch during your absence?      A. Do what?

Q. Check with your foreman to see what had been done on the ranch during your absence?

A. No, I didn't check anything. I checked into bed and went to sleep.

Q. Do you determine what crops will be raised on your ranch, or does your wife do that?

A. It is not often we change crops on these ranches and I always talk to the foreman about the change, if any, if there is any to be made.

Q. You sometimes make arrangements yourself for the repairs of the buildings or machinery on your ranch, don't you?

A. We haven't been doing any repairs or building at all since I got hurt, you might say, none that I know of.

Q. You don't recall of any repairs having been made?      A. No, I don't.

Q. Now, in addition to these 60 cows which constitute your dairy herd, do you have any steers?

A. Yes, we have some dry stock.

Q. How many head of dry stock do you have?

A. Oh, I don't know how many we got now, probably 75 calves and yearlings and different things; probably a little more. I don't just remember.

Q. Does Manuel Vieremontez look after those cows?

A. He looks after the whole ranch, everything.

Q. Now, those 75 or so head of dry stock is an increase in numbers over the number of head of

(Testimony of Thomas J. Hughes.)

cattle that you had on that ranch before you got arthritis, isn't that right?

A. Well, it is an increase that we have every year; that is, we have livestock every year on the ranch from growing up calves, and sometimes we have more than others.

Q. Now, in '45 and '46, didn't you run short of help out there at the ranch, in '45 and '46?

A. Well, I don't remember so much about the shortage of help. There has been a shortage of help in the Valley all the time, not only during war time.

Q. I will ask you if it is not a fact that during '45 and '46 that you personally milked some of the cows? A. Not that I remember of. [106]

Q. You don't recall whether you did or not?

A. No, I don't remember it at all.

Q. Now, who feeds the calves?

A. Manuel feeds the calves. The milkers that milk the cows generally feed the calves until they are, oh, probably three or four weeks old, and then the rest of the bunch is fed different feed and Manuel looks after this.

Q. You attended to the feeding of six of those calves, did you not, during '48?

A. Done what?

Q. Feeding of six calves, a half dozen of those calves, didn't you feed them regularly yourself?

A. No, I never did.

Q. Do you know Mr. and Mrs. Eddie Moore?

A. Yes, I do.

Q. They have worked for you? A. Yes.

Q. Did you have occasion to demonstrate to them

(Testimony of Thomas J. Hughes.)

the use of milking machines, how to use milking machines on your ranch?

A. I don't think so. I think the milker that was here before Eddie showed him how to milk them and I had the Surge man send a man over at different intervals to show him how to operate those machines.

Q. Who made arrangements with this Surge Company?

A. I called him up and told him to send him over.

Q. Do you recall now, Mr. Hughes, whether or not you did demonstrate the use of milking machines to these people?

A. I don't know. I didn't demonstrate the use of milking machines that I know of. I can't recall it.

Q. Now, I believe you stated you had run a tractor on two or three occasions, is that right?

A. Yes.

Q. Have you been running a tractor at all this year? A. None that I know of.

Q. When you ran the tractor, for what purpose was it being run?

A. Well, I don't recall just for what purpose it was being run. I think probably we were putting some borders up some place.

Q. What do you mean by that, Sudan grass?

A. No, that is the border that keeps the water on one land.

Q. When was that done?

A. Well, that was this last year, this last [108] summer.

Q. How long, speaking of days, did it take you to install those borders?

(Testimony of Thomas J. Hughes.)

A. Oh, it wouldn't take over a day to install the whole thing, I don't think.

Q. Did you run the tractor all day, personally?

A. No, I did not.

Q. Who helped you?

A. I think there was a young fellow by the name of, I can't think of his name. We had different fellows there that drove tractors for us. I think one of Hilbert's or one of Reimer's mechanics, tractor drivers, drove it most.

Q. And the tractor is used on your ranch to cut hay, is that right? A. Yes, it is.

Q. And also for disk purposes?

A. Yes.

Q. And have you in the last few years operated that tractor for disk purposes?

A. For disk?

Q. Yes.

A. Yes, we use it every year for disk.

Q. I mean have you yourself ran the tractor for disk?

A. I don't recall running it. I might have. [109] If I did, though, it would be for just a very short time because I couldn't run it very long at the most.

Q. Well, have you, yourself, operated that tractor to cut hay during the past few years?

A. No, there isn't any of my men that operated it either. That hay cutting has all been contracted out, different men take a contract cutting that.

Q. Who arranges for these contracts?

A. Well, we have a man that cuts it and this

(Testimony of Thomas J. Hughes.)

foreman tells him when the stuff is ready to cut,  
“Come and cut it.”

Q. Do you talk to the man that does the hay cutting?

A. Well, sometimes I do, sometimes I don’t see him at all.

Q. Did you make the financial arrangements with him for paying him for the work that he does?

A. I write the check for him.

Q. Well, do you make the deal in the initial instance as to how much pay he will get for doing that particular job?

A. Well, it is cut by the acre and we know just what the man is entitled to and I make him a check for his money.

Q. When you say “we”, you mean you and your wife? [110]

A. Yes, either one. I don’t know whether she makes any of those checks for the man that does the hay cutting or not. She would if I wasn’t there.

Q. Since you have had arthritis you have acquired more land that you had before then, isn’t that right?

A. Well, I don’t just remember, but I can get the records if you want to know. I got a deed to the property that I purchased.

Q. Maybe this will help. Let me ask you this, Mr. Hughes: Do you know whether or not you purchased 10 acres from Myrtle Clark on July 5th, 1940, Myrtle Clark? A. Yes, I purchased that.

Q. And then did you in ’42, November of that year, purchase 160 acres, the Northwest Quarter of

(Testimony of Thomas J. Hughes.)

the Northwest Quarter of Section 26, where your ranch is located, from Christopher T. Martin?

A. I bought from Christopher T. Martin 40 acres.

Q. Forty? A. Why, yes.

Q. It was not 160?

A. I have 160. The rest of that 160 I have owned for several years.

Q. So you purchased 40 acres from him in '42, [111] is that right? A. Yes, it is.

Q. Now, you gave him a mortgage on the land, did you not, back? A. I did.

Q. A \$2,000 mortgage? A. That is right.

Q. And you, yourself, signed the note and the mortgage, is that right? A. Yes.

Q. And then later on you became the Administrator for the Christopher T. Martin estate, didn't you? A. Yes.

Q. And in your capacity as Administrator you discharged that mortgage? A. I did.

Q. Now, how many acres of land, irrigated land, do you lease to others for farming purposes in this community?

A. I have 185 acres leased to the Hilvert Lettuce Company.

Q. Hilvert Company?

A. Hilvert Company.

Q. That is the Fred Hilvert Distributing Company? A. Huh? [112]

Q. Fred Hilvert Company? A. Yes.

Q. When was the lease negotiated that is now in operation for that 185 acres?

A. I don't get the question clear.

(Testimony of Thomas J. Hughes.)

Q. When was that lease entered into?

A. Well, they have an extension of two years commencing this last August, and they had it three years before, so they had it three years and they will have it in all about five and there is two years yet to go, that is this coming year, and then one more.

Q. So that over a period of five years, including a year to go in the future, the land is under lease with the Fred Hilvert Company, the same acreage?

A. Yes, they have had it for two more years. They have had it for three.

Q. So that last lease was a written lease, a written form of lease?

A. It is just a form lease, but it is not one that you would take from a regular form lease, it was just one made out on the typewriter.

Q. Did you, yourself, sign both of those leases?

A. I just signed the extension a short time ago, but the original lease I signed, but I don't [113] remember whether my wife signed it or not. I can't tell you.

Q. Then at least as to these two leases, now, the 185 acres with the Fred Hilvert Company, you entered into arrangements yourself with these people for the leasing of that land, is that right?

A. Well, they come to me, their man wanted the extension of the lease and I signed the extension, and gave it to them.

Q. What rent or rental is received by you on that 185 acres?

Mr. Laney: I object to that as irrelevant, going

(Testimony of Thomas J. Hughes.)

into that, what rent he received on his land. It seems it just takes up the time and it is useless.

Mr. Hull: May I be heard on that, your Honor?

The Court: Oh, he may answer.

Mr. Hull: What is the rental?

A. The rental is—you mean on the first part of the lease, now?

Q. Well, I mean how much do you get from the Hilvert Company?

A. Well, there is a difference in it. The last two years extension, the Hilvert Company pays for the increase in water, and before that, why, they didn't pay any, so if you want to segregate it. [114]

Q. Well, I don't know as I understand you, Mr. Hughes. What do you mean?

A. Well, the first lease was given, they paid me \$35 an acre a year and I furnished them two acre feet of water. Now, in this extension, the water is costing more and it is scarce, and they agreed to pay for that increase in rates on that water. Now, to give you an idea what that is, the water used to be \$3.50 an acre. Last year it jumped up to \$10.00, so they agreed to pay that increase, between \$3.50 and \$10.00, which would be \$6.50, so they paid \$3.25 more. In other words, in place of paying 35, it would be \$38.25 for this coming two years. You get the application now?

Q. Now, when you say that that was the arrangement, was that the arrangement that was put in this written lease you are talking about?

A. Well, it is put in the extension there.

Q. That was put in at your instance, wasn't it?

(Testimony of Thomas J. Hughes.)

A. Well, no, Mr. Hilvert knew of the cost of more water and he says, "I will just put that in there and if that ain't satisfactory, why, we will get together." I have known him a long time and he is a pretty fair fellow to deal with, so I just left it up to him. [115]

Q. So you and Mr. Hilvert arranged that?

A. That extension of the lease.

Q. That extension of the lease?

A. Yes, we did.

Q. Now, to whom, if anyone, was that land leased prior to the time that the Fred Hilvert Company took it over four or five years ago?

A. Who was it leased to?

Q. Yes.

A. I think I gave you that information once before in that record there, but at any rate, there was two different parties that leased, the S. A. Gerard Company had it for, I don't remember just how many years, and then Mr. Stoutzenberger, and I don't even know, I looked up the record, I tried to find out but I couldn't find any of the old leases. You asked for it.

Q. Yes, that is right.

A. Well, I am not able to find it. I don't know whether they are—

Q. Just briefly, then, Mr. Hughes, this land we are now talking about was leased during all of the time you have had arthritis, isn't that right, this 185 acres?      A. I don't think so.

Q. Since '42, has it been leased, the last six [116] years?

A. Well, I think that Mr. Hilvert's three years

(Testimony of Thomas J. Hughes.)

lease, I think before that there might have been one year there that the foreman had it in barley or wheat. I don't remember it; I can't recall about getting those leases because I have no way of telling.

Q. They were written leases, isn't that true?

A. All the leases that we made are written leases.

Q. Did you, yourself, sign those leases?

A. Yes, I did.

Q. You made the lease arrangements?

A. Well, I signed the leases.

Q. And you can't find copies of them, is that correct?

A. No, I can't. If you want them, though, I believe I can get the one from the Gerrard Company, but I doubt about the other party because they are not here.

Q. Mr. Hughes, you, yourself, handled them with the Stoutzenberger and with the Gerrard Company as well as with the Fred Hilvert Company for the leasing of these 185 acres?

A. Yes, but get me this way, now, Stoutzenberger didn't have all of that land, that 185 acres. He [117] only had 85 of it.

Q. No, the question I asked you, Mr. Hughes, was, isn't it a fact that you, yourself, handled those leases with those people, that you, yourself, did that?

A. Yes. I thought you meant the 185 acres.

Q. Perhaps I did say that.

A. It was just 85 that Stoutzenberger had.

Q. However many acres they had, you, yourself, made the lease? A. Yes, they called me up.

Q. Now, in leasing to the Fred Hilvert Company

(Testimony of Thomas J. Hughes.)

you had occasion to go into their office on a number of occasions to discuss the irrigation program for that land, did you? A. To do what?

Q. To discuss the irrigation program for that land.

A. Oh, I haven't been in Hilvert's office until I signed that extension.

Q. Do you know Mrs. B. G. Price, the office manager for that company? A. Yes, I do.

Q. Had you on several occasions discussed with her the amount of water that was to be applied to that land during the seasons it was leased by the [118] Fred Hilvert Company?

A. Well, the only thing I remember was that they didn't furnish quite enough water for the land according to the acreage, and I think we checked that up and they changed it.

Q. You did discuss that with Mrs. Price, didn't you?

A. I made the correction over at the Water Users' Association Building on the shortage of water they had there; that is, in regard to the acreage.

Q. Do you know how long ago that was, Mr. Hughes?

A. Well, it has been quite a little while ago.

Q. Now, let me ask you this: Had you supervised the 40 acres of irrigated land south of Phoenix in addition to this land here at Tempe?

A. No, I don't. My sister wrote me from Kansas City to lease that land for her, and I put in an ad in the paper to lease it. A fellow from Avondale wanted it and he come up and said he would take it,

(Testimony of Thomas J. Hughes.)

but he didn't have any finances. He wanted it plowed up and got ready for grain, and I called on Jack Kleck and told him my sister wanted the land all plowed up. He plowed it up before and fixed it up for grain, so he did that, [119] and this fellow was to get the money, this fellow from Avondale was to get the Capital Fuel & Feed Company to finance him. He said they would guarantee it, to pay the money for it, so I went over to see Stein one day, or called him up, I forget which, and he says, "That fellow owes us \$7,000." He said, "I wouldn't finance him for anything," so I told my foreman, "I suppose while we got the land there and all, so you go over and plant that grain for her and get it ready and have it harvested and deliver it down there where the grain and barley is now, down here at the mill."

Q. What mill?

A. The Hayden Flour Mill.

Q. The barley from that 40 acres, is that right?

A. Yes, it is.

Q. Mr. Hughes, is that your barley now, or is that your sister's?

A. That is my sister's barley. I have nothing at all to do with it only to sell it for her, or she will sell it when the price gets right.

Q. You handle all of these assets for her, such as advertising it, discussing it with the prospects, discussing and arranging to have it planted and harvested, is that right? A. Yes, I do. [120]

Q. Who made the arrangements to store the grain at the Hayden Flour Mills?

A. Well, I have arrangements there all the time to store grain. They always store my grain, whether

(Testimony of Thomas J. Hughes.)

it is wheat or barley or what it is. I never make settlement for that probably for---well, next year, after it is thrashed.

Q. Do you, Mr. Hughes, have at the Hayden Flour Mill at the present time your own cutting of barley?

A. I have some 1,200 sacks of barley down there that was cut at the home ranch. It is in sacks. The barley that come from this 40 acres is in bulk.

Q. You are better off financially than you were before you got arthritis, aren't you?

A. Well, I'd be better off if I would have this judgment, this money I am suing for.

Q. The question is, Mr. Hughes, you are better off financially than you were before you got arthritis?

Mr. Laney: Just a minute, I object as irrelevant and immaterial.

The Court: Oh, I think it is, but he may answer.

A. Now?

The Court: Yes. A. Well, I expect so.

Mr. Hull: Q. Where is the milk sold from the [121] ranch?

A. The Borden Creamery Company.

Q. At Tempe? A. Yes.

Q. That is a condensed milk plant over there at Tempe?

A. I don't know what they do with it now. They had a condensed plant there at one time.

Q. How long has the milk from your ranch been sold to Borden's at Tempe?

A. Well, the Borden Creamery have come in there later on, but ever since I sent any milk to the creamery at all it has gone to the creamery.

(Testimony of Thomas J. Hughes.)

Q. What do you receive by way of income from the sale of the milk per month?

A. When do you mean?

Q. Let's take it right now, right in this season of the year.

A. This season of the year the milk—there isn't quite so much milk, the pasture has not been so very good and probably it would run, probably eight or nine hundred dollars.

Q. A month?

A. Yes, maybe a little more, maybe a little less.

Q. Would it average, say, a thousand dollars a month over the year? [122]

A. Well, it might from now on, but I rather doubt the other part of the year whether it would or not.

Q. Well, how much do you receive from the sale of milk during the best months on your milk?

A. Well, around a thousand dollars.

Q. Around a thousand dollars? A. Yes.

Q. So it is around between nine hundred and a thousand all the time?

A. Well, I think somewhere about there.

Q. Was that true in the year '41?

A. Well, I think the year '41, I think it is a whole lot less. I don't think it is over \$350 or \$400. The price of milk was awfully low.

Q. Are you selling more milk today than you were in '41, gallons?

A. Well, there is more of it, yes, and then the price is quite a good deal different, probably a dollar, and on seven or eight cent butterfat.

(Testimony of Thomas J. Hughes.)

Q. Now, you go over to the Borden plant a couple of times a month to receive your checks for the milk, don't you?

A. I have not been to the Borden plant any time in the last two or three years to receive checks.

Q. Do you remember Mr. V. A. Vogel, who is the [123] superintendent over there?

A. Yes, I know Vogel.

Q. He was superintendent until '43?

A. Yes, I know him very well.

Q. Did you go over there then and pick up your milk checks while he was there?

A. I did at times, I went over there with the milker that was milking cows. I used to drive down there once in a while with him and they had a hot shower there. I used to go in there and to get relief from the arthritis, turn the hot water on.

Q. You also picked up your milk checks on those occasions?

A. Well, if he was there I would. Sometimes they would send it out, but this last company have always sent it out. You never have to go get it.

Q. Do you know the superintendent over there now? A. Yes, I do.

Q. Mr. Hollingshead? A. Yes.

Q. You would discuss dairy problems with him from time to time, didn't you?

A. The only thing I discussed with him very much is the sending us out of a milker if he could [124] find a good man.

Q. Have you discussed with him such matters as prices on milk?

(Testimony of Thomas J. Hughes.)

A. Well, not so very much, not that I remember of.

Q. Have you discussed with him matters of equipment, your milking machines and various related machines to the dairy industry?

A. Well, I don't remember of discussing those with him, those things with him. He sends their man out there occasionally when the milk is not very clean, and makes an inspection of the milk and the milk house and all, and that fellow's name is Mr. Cain. He is the field man.

Q. You talked to Mr. Cain about those problems?

A. No, he talks to the man that milks.

Q. How does it come to your attention; does that man that does the milking report it to you?

A. How is that?

Q. How does it come to your attention; does that to your attention? He tells you about this complaint?

A. The Borden Creamery Company sent out a notice on the can when it is bad milk, or unclean. Sometimes they call up at the house and tell my wife about it, and sometimes if I am there, I answer [125] the phone and they will tell me, and I told them to send out the field man and see what is wrong, so they send him out occasionally to inspect it.

Q. Is anything done by you with reference to satisfying their complaint?

A. Well, he shows them what is wrong. Sometimes they don't put enough pads in the strainers and the milk is not so good.

Q. Who sells your grain, your barley and your alfalfa, who actually sells that?

(Testimony of Thomas J. Hughes.)

A. Well, I sell it when it is sold.

Q. Do you sell to the Tovrea Land & Cattle Company, don't you? A. Sell what?

Q. Sell grain to the Tovrea Land & Cattle Company? A. Tovrea Land & Cattle Company?

Q. Yes.

A. I never sold anything to the Tovrea Land & Cattle Company, I sold stuff to the Tovrea Packing Company.

Q. Maybe I am mixed up on it. When was this sold to the Tovrea Packing Company?

A. I don't remember, some time back. We haven't sold them hay for the last couple of years to the Packing Company. I don't just remember what time [126] it was, some time back, though.

Q. Do you recall how long back it was?

A. No, I don't just remember offhand. I can look up the records for you if you want it.

Q. Back in '46 you were selling hay and grain to the Tovrea Company, weren't you?

A. In '46?

Q. Yes, back in May, '46?

A. Well, I can't tell you whether I was or not. I don't remember, but I sell them hay and I sell them barley, sometimes both.

Q. And sometimes you sell them cows, don't you? A. Yes.

Q. And bulls? A. Yes.

Q. And steers? A. Yes.

Q. Do you have any horses or any mules on the ranch?

(Testimony of Thomas J. Hughes.)

A. We have got a horse that they use for bringing the cows in, and then we got a couple of mules that are pretty old mules, and have a Palomino mare there, a young one.

Q. Now, in addition to these sales that you make to the Tovrea people, do you, yourself, sell some products to the Hayden Flour Mills; do you [127] make any sales to the Hayden Flour Mills?

A. The Hayden Flour Mills never buy any hay.

Q. Well, do they buy any barley?

A. Yes, I sell them barley.

Q. And is that true over the past five or six years that you have been doing that?

A. Well, I haven't been selling them it all, because I sold some to the Tovrea.

Q. Where do you buy your seed?

A. Seed?

Q. Yes. A. I use my own seed.

Q. Do you ever buy seed from the Hayden Flour Mills?

A. I always have seed stored there. I use my own seed, and they charge me so much for recleaning it.

Q. Who makes those arrangements with the Hayden Flour Mills? Do you, yourself, do that, Mr. Hughes?

A. I just call them up and tell them to send me out so many sacks of seed to plant, and they send them out.

Q. Do you have with you a copy of your account with the Tovrea Company over the past few years?

(Testimony of Thomas J. Hughes.)

A. No, I haven't.

Q. Do you have with you a copy of your account with the Borden's, or a copy of your account with the Hayden Flour Mills?

A. Copy of the account in what way, one month or what?

Q. Let me ask you this: In March, 1948, didn't you go to the Hayden Flour Mill and spend two or three hours in going over your account with them and making a complete record of what you found on their books?

A. The last time I was down there I went down and made settlement with them for some grain I sold.

Q. Do you know when that was?

A. No, I don't remember when it was. I think it was the last time I was there, but I am not sure.

Q. Do you recall going down there in March of this year and going over the books?

A. No, I can't tell you whether it is March or not. I don't know.

Q. Do you recall going down—

A. Yes, I went down there but I don't know when it was.

Q. Did you make any written copy of what you found in those books there?

A. They made me a statement and I don't know just where that statement is. It is at home some [129] place.

Q. Now, did you yourself go over and check your account with the Borden Plant?

(Testimony of Thomas J. Hughes.)

A. No, I didn't go over there at all. I haven't been to the Borden Plant for quite awhile. They send out a statement every two weeks with a check in it.

Q. What I meant is you always check that for accuracy yourself, you go over the account, don't you?

A. I haven't been checking it at all. I just get a statement, look at it and take the check and deposit it.

Q. Does anyone besides yourself have authority to sign checks on the checking account in the First National Bank of Tempe?

A. My wife signs checks there.

Q. But she does not sign on the Valley Bank in Phoenix, is that right? A. No.

Q. Now, your wife has rheumatism, hasn't she?

A. Well, she has had, but she has kind of bunions on her feet that bothers her.

Q. She is not very active in getting around physically?

A. Well, I think she is more active now than I am.

Q. Well, does she make the deposits in either of those accounts at either bank at the time the deposits are made?

A. No, I think I make them deposits myself mostly.

Q. Does she make any withdrawals; does she sign any checks on the other account at Tempe?

A. Does she sign any checks?

Q. Yes. A. Yes, sure.

(Testimony of Thomas J. Hughes.)

Q. She does?

A. Yes. If she wants any money, why, she just writes out a check against it. If she wants to pay anybody, why, pay them.

Q. Who pays the household bills out there at the ranch?

A. Oh, she does sometimes, sometimes I pay it.

Q. Do you have with you your cancelled checks for—on either account, in response to the subpoena that has been served on you?

A. Yes, the checks is all here.

Mr. Hull: May I see them, please?

(The documents were presented to Mr. Hull.)

Q. Do you know how many years this covers?

A. Yes, I do. It covers what the Court asked for.

Mr. Laney: The subpoena, you mean.

Mr. Hull: July 1st, 1941.

A. All right, you got them there.

Q. Are these arranged by years, do you know?

A. Yes, they are, month by month, if you will keep them separate. If you keep them separate—if you want to look at them, don't get them all mixed up.

Q. I would like them numbered—I would like to have them identified by years or some way so I can facilitate the inspection of them without messing them up.

A. Why don't you take the year '41, from July, '41, for the rest of the year?

Q. Have you had occasion to go over these

(Testimony of Thomas J. Hughes.)

checks since the subpoena was served on you to produce them? I mean have you looked them over during the last few days or the last week or two?

A. The only time I looked them over, when I opened them, was to get out these checks that I paid your Insurance Company. I went to each bundle of checks where I knew that check would be, and I got it and that statement there with the checks, that check will be missing, see?

Mr. Hull: Now, if the Court please, it is [132] about time to adjourn. I'd like for the purpose of facilitating this examination to look these over without bothering the Court and the jury with it, and I would like to have them marked some way for identification so I might have the privilege of looking at them in case we want to use them, if it is agreeable with counsel that I may use them without marking them for identification.

The Witness: Well, you got——

Mr. Laney: Just a minute, this is something to be settled between lawyers.

The Witness: All right.

Mr. Laney: It is all right with us for the Clerk to put a tag on it and mark it for identification and there it will be.

(Thereupon the documents were marked as Defendant's Exhibit B for identification.)

Mr. Hull: How about the suitcase?

The Witness: Put them all in the suitcase and keep the whole business, but don't lose it.

The Court: We will suspend at this time until ten in the morning. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 4:55 o'clock p.m. of the same day.) [133]

10:00 o'Clock A.M., October 14th, 1948

All parties as heretofore noted by the Clerk's record being present, the trial resumed as follows:

The Court: You may proceed.

THOMAS J. HUGHES

resumed the witness stand and testified further as follows:

Cross-Examination (Continued)

Mr. Hull:

Q. How old are you, Mr. Hughes?

A. I am 72.

Q. 72?      A. Yes.

Q. Do you keep a record, a written record of the financial transactions out there at the ranch?

A. I keep a record, yes, of the sales and the money that is taken in for those sales.

Q. Are the entries made in your handwriting?

A. Yes, they are.

Q. What items or entries do you make in there? I am referring now to such things as sales. Do you also keep in there the amounts you pay for ranch repairs or for cutting hay or threshing hay or any of those services? [134]

A. Well, in that record is kept all of the different items of that kind, the amount of money

(Testimony of Thomas J. Hughes.)

that is spent for repairs for machinery and also for labor and different things.

Q. Have you done that each year for the years '42 through to the present time, we will say, have you kept that record right up to date?

A. Well, no, this year isn't up to date.

Q. This year is not up to date? A. No.

Q. But with the exception of this year, or, we will say, to the first of '48, it is up to date, is that correct?

A. Yes, they are all up to date, yes.

Q. Do you have that here, Mr. Hughes?

A. Yes, I have.

Q. I want to show you a book, a covered book marked "Record," which is Defendant's B-1, Mr. Clerk.

The Clerk: Yes, that is a part of "B," so that will be the first one.

Mr. Laney: Would counsel mind marking it separately, then?

Mr. Hull: I think it is to be marked separately.

(Thereupon the document was marked as Defendant's Exhibit B-1 for identification.) [135]

Q. (By Mr. Hull): I want to hand you B-1, a record book, and ask you if that is the book which you referred to, would you just look at it, please, and tell me whether the entries are all made in your handwriting?

A. If they are all made? I am sure they are, because I made all of those records—well, not all of those, there is some Mr. Haroldson made.

(Testimony of Thomas J. Hughes.)

Q. Mr. Haroldson is the man that makes out your income tax statements? A. Yes, sir.

Q. I presume that anything in here that represents the income tax would be made by him, is that correct? A. Yes, and any corrections.

Q. Most of the entries are made in your handwriting? A. Yes, they are.

Q. Did you bring with you in response to the subpoena, Mr. Hughes, a record of the milk sales to the Borden Company at Tempe for the period some time in '41 up to some time in '48, which was designated in the subpoena?

A. I don't have the bills, but I have in that book of records the amounts of sales of milk each year.

Q. Those are all reflected in there?

A. Yes.

Q. I would like to show you Defendant's Exhibit B-2 for identification, which consists of a number of entries made upon the slips headed "The Borden Company, Tempe, Arizona," and I will ask you if those are your records?

A. These are statements that is sent out by the Borden Company, and at the end of the year when we make up the tax, income tax report, we figure all of these up for each year and enter it on that record there of so much milk sales. I think you got a part of one year and a part of another in there.

Q. If you will examine them I think you will find there are no entries except for '47 and '48.

A. Well, the '48 has not been entered at all.

Q. I think there are one or two '48 slips in there.

(Testimony of Thomas J. Hughes.)

A. Whatever for '48 in here has not been entered at all. '47 has all been entered in the book of record.

Q. Mr. Hughes, these are all of the slips of this character that you have for the years involved that I asked about, that is correct, is that right?

A. For the year, yes. [137]

Q. Some in '41?

A. Oh, no, there are some more of them, I don't know where they are.

Q. You could not find them?

A. No. The only thing I have a complete record of sales on that milk is in that record book.

Q. Surely, but I mean you could not find any others?

A. I didn't find any. I looked there where I keep some other papers and I couldn't find it. Now, this '47, these are all together for the year.

Q. These are all in there?

A. Well, whatever—this much on the '48. There may be some short. I couldn't tell you.

Q. I see, but you don't have any for '46, '45?

A. No.

Q. '44, '43, '42 or '41?

A. I don't think I have, but I have a complete record of the sales of milk for that year.

Q. That is in that record, I believe you told us?

A. Yes, it is.

Q. Now, Mr. Hughes, in the operation of your irrigated land it is necessary to pay for water, any excess water for the irrigation of the land, isn't that true? [138] A. Yes, it is.

(Testimony of Thomas J. Hughes.)

Q. Now, who pays for the water to the Salt River Valley Water Users' Association?

A. I pay the water assessments, but the excess water on land that is leased is paid by the party that has it leased. Any excess water that I use on the other portions of the land, I pay for.

Q. Now, I want to show you a series of checks drawn on the First National Bank of Arizona, or, rather, the First National Bank—yes, the First National Bank of Arizona, the Valley National Bank, those two banks, all drawn payable to the Salt River Valley Water Users' Association and marked Defendant's Exhibit B-3 for identification, and I will ask you if your signature appears on those checks, please, sir (handing documents to the witness) ?

A. My signature is on every one of those.

Q. Do you recall any instance, Mr. Hughes, when a check is made payable to the Water Users' Association for water, that anyone other than yourself paid for it, for water on the irrigated lands?

A. I paid for all but the excess water on the land that is leased.

Q. Now, Mr. Hughes, I believe you told us yesterday that you, yourself, made all of the [139] deposits in the Valley National Bank, which was your sole account, and in the First National Bank of Arizona at Tempe, which was the joint account with your wife, is that right?

A. Well, I think on the Valley Bank that at different times there was money deposited over there for me that I didn't personally make myself. Now,

(Testimony of Thomas J. Hughes.)

it might have been the Hayden Flour Mills or it might have been somebody else.

Q. I want to show you a list of deposit slips marked B-4 Exhibit for identification, for the First National Bank and the Valley Bank, and I will ask you if those bear your signature, please?

A. (Looking over documents): There is no signature on this slip that carries mine.

Q. I see. With the exception of those three that do not bear any signature at all, will you state whether or not your signature appears on all of those that are signed?

A. That is my signature on all of them but those three, and has no signature at all.

Q. Thank you. Now, Mr. Hughes, who pays the taxes? A. I do.

Q. On the land, you pay them?

A. Yes, I do. [140]

Q. And you pay these by checks drawn on the banks that we have referred to in the testimony?

A. Well, it is either one bank or the other, I don't know what bank, but sometimes one bank and sometimes the other.

Q. I'd like to show you a series of checks drawn payable on those banks marked Defendant's Exhibit B-5 for identification, and I will ask you if those represent tax payments by you?

A. My signature is on all of those checks. I say that is my signature on all of them.

Q. They represent tax payments?

A. Yes, they do. There is one there I kind of

(Testimony of Thomas J. Hughes.)

rather doubt about, I kind of doubt what it is. It is a small amount.

Q. Would you like to examine it again?

A. No, that is all right, let it go.

Q. Now, Mr. Hughes, I show you Defendant's B-6 for identification, purporting to be a check by you drawn payable to the Arizona Title Guarantee & Trust Company in the sum of \$3873.88, and will ask you if you can state just briefly what that represents.

A. What it represents?

Q. Yes.

A. It represents the purchase of a residence property that I am giving to my daughter out here in Windsor Square.

Q. I see. You are purchasing land for her?

A. I purchased that home for her. That is part payment.

Q. Now, Defendant's Exhibit B-7 for identification, purporting to be a check in the amount of \$1250, payable to Bert Cavanaugh, Realty. Will you tell us what that is?

A. Yes, that is on the same piece of property.

Q. That is the same transaction? A. Yes.

Q. Is that an escrow transaction with one of the Title Companies here?

A. It was, but it is out now, and I have the deed to it, the deed to my wife and I.

Q. I want to show you a check marked Defendant's Exhibit B-8 drawn to Pete Obregon it looks like and in the amount of \$162 purporting to be for baling hay. Did you write that check?

(Testimony of Thomas J. Hughes.)

A. Yes I did.

Q. Does it represent pay for hay baling?

A. Yes.

Q. On your ranch? A. Yes.

Q. And Defendant's Exhibit B-9, drawn payable [142] to Hobart Barbour, threshing and hauling, is that an expenditure made by you for the purpose indicated thereon?

A. This is the amount of money that was paid for threshing the barley on that 40 acres you asked me about yesterday.

Q. I see.

A. This one, \$282, and the hauling is included in the threshing.

Q. Thank you, and Defendant's Exhibit B-10, a check payable to Palmer Welding, \$473, marked "threshing grain and hauling." Can you tell us what that is?

A. This is for threshing and hauling on the home ranch where I live, 1200 sacks or more of barley.

Q. And the check here, I can't make out the name of the payee, \$153, marked "Baling 34 tons of hay," marked Exhibit B-11. Will you tell us what that is, please?

A. This is de la Cruz, is the fellow's name. This is for baling 34 tons of hay on the home ranch.

Q. On the home ranch? A. Yes.

Q. And Defendant's Exhibit B-12, drawn payable to the Valley National Bank in the sum of \$4021.11. [143] Will you tell us, please, briefly, what that is?

(Testimony of Thomas J. Hughes.)

A. This is in payment of a note that I owed the Valley National Bank and included—it was \$4000, and the interest is included, Twenty-one dollars and something.

Q. Then I take it you had, prior to February 5th, 1948, the date of this check, borrowed money from the Valley National Bank, is that right?

A. Oh, yes.

Q. How long did you do that, do you remember, just roughly? A. This one here?

Q. Oh, just approximately.

A. Well, I don't just remember.

Q. Did you from time to time during the years '42 to '48 borrow money from the Valley Bank?

A. Yes, but I don't know just what dates or how far back.

Q. Surely, but did you sign loan applications for these particular loans?

A. Yes, and I had my wife sign one of them. I don't remember the date I signed it.

Q. If she signed—she signed them and you signed them all, did you not?

A. I signed them all, yes, but I think she signed them with me on the application, or something, [144] that they sent and I mailed it back to them.

Q. Did you borrow any money from the First National Bank of Tempe during those years?

A. Commencing what year?

Q. Well, commencing, say, with July, '41, and going right on up to the date of this check, say, February, 1948?

(Testimony of Thomas J. Hughes.)

A. Well, I couldn't say positively about that, but I don't think that I borrowed any money from the bank in Tempe for a good many years.

Q. When the loans were paid off, did you make payments to the Valley Bank in payment of those different loans as, for instance—

A. The other loan?

Q. Yes. A. Yes, I paid it.

Q. Now, I want to show you B-13, a check drawn to the Concrete Conduit Company, \$546. Can you tell us what that is, please?

A. Yes, this is for these concrete headgates that you put on the ranch to let the water through on the different lands.

Q. By the irrigation ditches? A. Yes.

Q. And showing you Defendant's Exhibit B-14 for identification, drawn payable to the Phoenix Motor Company, \$1214. Will you tell us what that is, please?

A. This is a check given to the Phoenix Motor Company for a new Buick automobile that I gave to my son, the one that is a doctor that just come back from the Army. This is a part of it. The Valley Bank has the other check.

Q. Well, then, on October 10th, 1947, you did buy an automobile, is that correct, a new Buick?

A. For my son.

Q. I am referring to B-14, in case I haven't identified it. I hand you Defendant's Exhibit B-15, a check payable to the O'Malley Lumber Company,

(Testimony of Thomas J. Hughes.)  
in the amount of \$17.95, and indicated for supplies.  
Can you tell us what that is, please?

A. Well, I think it is this—I might be wrong about it, but I think it is this tampon canvas that we use in the irrigating ditches.

Q. When supplies are purchased for the ranch out there you make those purchases yourself, is that correct?

A. Well, I'd go for them sometimes if I go down. If they want it, if they need any supplies like that, why, sometimes I'd send down there, the milker would go and get it sometimes and later I would pay for them. This check is in payment of [146] a bill that I owed there.

Q. Do you also deal with the Stapley Company in the matter of supplies for your farm?

A. Oh, yes.

Q. I want to show you Defendant's Exhibit B-16 for identification, marked payable—well, I can't read the name of the payee, dated July 12th, 1947, and indicated for "baling." Can you tell us what that is, please?

A. This is a check given to the same party that we gave some time ago for baling hay. That is Alvin de la Cruz.

Q. Was he working for you?

A. No, he owns his own baler.

Q. Did you contract with him to bale in '47?

A. Well, he has been baling for us for the last summer, and I know he baled for us in '47.

Q. Did you have a written contract on that?

(Testimony of Thomas J. Hughes.)

A. No, we didn't.

Q. He has baled for you a number of years, is that correct? A. Yes, different times.

Q. Now, I want to show you Defendant's Exhibit B-17, a check drawn to someone whose name I can't distinguish, indicating for "storing hay." Can you tell us what that is, please, sir? [147]

A. This is for hauling hay out of the field and storing it over on the ranch for the use of dairy cows.

Q. And now, Defendant's B-18, payable to John P. Joyce and marked "repairs tractor." Can you tell us what that is, please?

A. Well, that is supplies that John brought over for me and he paid cash for the stuff, and this is a check to reimburse him for it.

Q. Was it for the repair of the tractor that is used on your ranch? A. Yes, sir; it was.

Q. And Defendant's Exhibit B-19, payable to John Ramirez, \$57, indicated for storing hay in '47. Will you tell us what that is, please?

A. Well, this is for storing hay to bale on the ranch and store over there for the use of dairy cows.

Q. And Defendant's Exhibit B-20, payable to Mr. Perez, marked "hauling barley" in '47. Can you tell us what that is?

A. This is for the same kind of work, storing hay over at the farm.

Q. Now, B-21, payable to somebody by the name of Kleck, I believe, \$304 for—I can't read that.

A. This represents the cost of putting that [148]

(Testimony of Thomas J. Hughes.)

land, that 40 acres and preparing it to plant barley.

Q. That you did for your sister?

A. Yes, that is what it is for.

Q. Now, look at Defendant's Exhibit B-22, drawn to the Valley National Bank in the amount of \$4536, March 4th, 1947. Will you tell us what that is, please?

A. Well, that is a note for \$4500, and the \$36 added to it there is interest.

Q. Was that in payment of one of the loans that you told us about awhile ago?

A. Yes, it was. There is interest of \$36 and principal of \$4500.

Q. In other words, that represents the payment of that loan that you secured from that bank?

A. Yes.

Q. Now, would you look at Defendant's Exhibit B-23, drawn payable to Harold Y. Heiskell, and marked "milking machine repair," and state what that is, please?

A. Well, this is parts for the milking machines from the Surge Company that we purchased for the dairy.

Mr. Laney: May I see that?

Mr. Hull: Surely. That is for your dairy? [149]

A. For the cows, yes.

Q. Defendant's Exhibit B-24, drawn payable to the Valley National Bank, Customer's Securities Department, in the amount of \$22,000. Will you tell us what that is, please?

A. That is the purchase of Government G Bonds.

Q. You made this purchase, did you?

(Testimony of Thomas J. Hughes.)

A. I did.

Q. Did you purchase those bonds out of the income that you had received from the operation of the ranch and the dairy?

A. I think I will have to look it up to be sure.

Q. Now, Defendant's Exhibit B-25, drawn payable to Charles Saylor, in '46, \$497, marked "baling hay." Can you tell us what that is, please?

A. Yes, that is for baling hay.

Q. How many tons does that cover?

A. 142 tons.

Q. Defendant's Exhibit B-26, drawn payable to the Hayden Flour Mills, December 20th, 1946, in the amount of \$3030.56. Will you please tell us what that represents?

A. That is in payment of some wheat that I got from them.

Q. You purchased wheat then, in '46 from the Hayden Flour Mills? [150]

A. Well, that was some wheat—I paid them for that wheat. They loaned me that wheat until mine was threshed.

Q. Did you need this wheat for some particular purpose?

A. Well, it was sent over to my step-son over in California.

Q. Did you have arrangement with him to supply him with wheat at a certain time?

A. No, other than just they were awfully short on wheat and he was over here and wanted wheat, and I told him to just borrow it from the mill and then pay them back.

(Testimony of Thomas J. Hughes.)

Q. You were ultimately paid for the wheat, were you not? A. Huh?

Q. You were ultimately paid for the wheat that is represented by that? A. Oh, yes.

Q. Look at B-27, drawn payable to Sam De Priest, in 1946, \$31.20, marked "sub-soiling," or something of that nature. Will you tell me what that is, please?

A. This is contract work on sub-soiling on the ranch.

Q. Sub-soiling? [151]

A. Yes. I think there is another one there, a larger check. I think that is the final payment. I am not sure. I think there has been more than that.

Q. What do you mean, just briefly, by sub-soiling, please?

A. Well, in preparing land so it will take water good, some hard land and they use a sub-soiler. Well, it has got long hooks, shanks on it, and goes down in the ground 18 to 20 inches to loosen the land up.

Q. How often do you do that out on the ranch?

A. Well, it is not done so very often. It depends on what type of land it is. If it is sandy land it would not need it very much, but if it is adobe land and awful hard, it requires it more often.

Q. Have you had occasion to do any of that sub-soiling work anywhere on that ranch since November 20th, 1946? A. '46?

Q. Yes.

A. I don't think so. I am not positive of that, however.

(Testimony of Thomas J. Hughes.)

Q. Here is a check marked B-28, to Pete Obregon, marked "baling hay," in 1946. Will you state what [152] that is, please?

A. That is for baling hay that we use on the ranch there for the dairy cows.

Q. For the dairy cows?

A. I think so. It is stored on the ranch for the use of the dairy cows.

Q. Now, here is a check marked for identification as B-29, payable to Roy Painter, and marked "one bull." Will you state what that is, please?

A. Yes, that is a registered bull that I bought from Mr. Painter.

Q. In '46?

A. Well, whatever the date there is.

Q. Mr. Painter lived near you?

A. Well, a few—not so very far, about two or three miles.

Q. Is he the same Mr. Painter that has currently served on the Board in the Rural School District No. 13 with you? A. Yes, it is.

Q. The same man. I'd like to show you B-30, payable to Mr. De Priest, marked "plowing and sub-soiling," November 8th, 1946, and ask you what that is.

A. Well, this is the one that I told you about awhile ago. There is more of that sub-soiling and that is the same thing, I think. Well, it is marked here, "plowing and dragging and sub-soiling."

A. Well, you made those remarks on there, didn't you, Mr. Hughes?

A. Yes, I made all of them.

(Testimony of Thomas J. Hughes.)

Q. That was the exhibit I referred to as B-30, in case I didn't identify it. Now, B-31, drawn payable to Harold Y. Heiskell, in '46, in the amount of \$78.12, marked "dairy expense." Will you tell us what that is, please?

A. Well, I think that is for—I think that is in payment of a trade I made with him. I turned in some old machines, I think that is it. I am not positive, but anyway that is dairy supplies.

Q. That is the dairy on which you have 60 or so cows on the ranch?

A. That is correct, yes.

Q. Defendant's Exhibit B-32 is marked payable to O. S. Stapley and Company in the amount of \$100, marked as payment on some disc, I believe it is. Will you please tell us about that?

A. Yes, that is the payment of a border disc. We could not get it at the time and they wanted a payment down on that, so I made the payment.

Q. You bought a border disk then, did you, in January, '46? [154]      A. Yes.

Q. Now, here is one that is marked B-33 for identification, January 14th, 1946, in the amount of \$1800, drawn on the Collector of Internal Revenue, and indicated "on estimate, 1946 income tax." Would you tell us what that is, please?

A. That is on the estate.

Q. What does that mean?

A. That is not "estimate."

Q. Oh, I see. Very well. It is "est" and I misinterpreted it. Will you look at Defendant's B-34,

(Testimony of Thomas J. Hughes.)

drawn payable to A. J. Schlessinger in the amount of \$1000, December 29th, '45. Will you tell us what that is, please?

A. Yes, that is for the preparation of land. That was all plowed up, subsoiled. It does not state here exactly what that was, but it was sub-soiled and disked and put it up in shape to plant.

Q. Who was this man Schlessinger?

A. Well, he is the fellow that lives in Chandler and he does contract work and a tillage company.

Q. In '45 you had him prepare the home ranch, is that right?

A. No, that is the ranch west of where I live.

Q. Well, did you tell us about that ranch yet; [155] I mean have we talked about that ranch at all, this ranch west of where you live?

A. Well, it isn't the home ranch. The home ranch is the other quarter.

Q. I mean is it a part of the 160 acres that you operate as a unit?

A. I think you got it wrong. It is 160 acres, what they call the old Blake Ranch that is just west of where I live. Where I live is the home ranch and there is about 70 some odd acres on the home ranch where I live. This work was done on the Blake ranch, out on the Northwest Quarter of Section 26.

Q. This is the ranch land that you paid taxes on?

A. Oh, yes.

Q. Defendant's Exhibit B-35, November 6th, 1945, drawn payable to the Hayden Flour Mills in the amount of \$1,142, marked "Alfalfa seed." Will you tell us what that is?

(Testimony of Thomas J. Hughes.)

A. Well, that is what it is for. It is for to plant alfalfa seed on this land that they prepared.

Q. Mr. Hughes, maybe I misunderstood you yesterday. Didn't you tell us yesterday you did not buy seed, you raised your own seed? [156]

A. You was talking about barley.

Q. Oh, I see.

A. I don't raise any alfalfa seed.

Q. Now, B-36, drawn payable to the Western Union, August 28th, 1945, in the amount of \$201.73. Will you tell us what that is?

A. I think that this is money that I wired my son.

Q. I see. Very well.

A. I could find out exactly if you want to know, but I am pretty sure that is what it is.

Q. It does not represent anything at the ranch, then? A. No.

Q. I will show you Defendant's Exhibit B-37, drawn payable to this man Schlessinger again in the amount of \$300, and marked "threshing," I believe. Will you tell us what that is, please?

A. That is something like subsoiling, but some of them call it chiseling. Now, this is work that he done in addition to the thousand dollars over there.

Q. On your ranch?

A. Yes, and where we plant that alfalfa.

Q. This is the man at Chandler that you hired to do that? [157] A. That is right.

Q. B-38, marked payable to Mr. De Priest in

(Testimony of Thomas J. Hughes.)

the amount of \$120 and marked "Disking" something. Will you tell us what that is, please?

A. Well, now, this is disking land in preparation for, well, some of them disk it to plant grain and some of them plow it and disk it and drag it. This is probably double disked, I take it. If it is double disked, then it is a little cheaper than it is to plow and drag it.

Q. On June 9th you did have this man, Mr. De Priest, double disk that land? A. Yes.

Q. Will you look, please, at Defendant's Exhibit B-39, and drawn payable to the Palmer Manufacturing Company—Corporation—in the amount of \$110. Do you know what that is, please, sir? I have just a few more, your Honor.

A. That is for a cooler that I gave to my daughter to put in her home up here.

Q. Where is her home?

A. 1300 West Adams.

Q. Do you own the land?

A. Well, it is in my name, but I gave her the property. There is a home there.

Q. But the deed is in your name? [158]

A. Well, it is yet, but we gave it to her, my wife and I, and then she wanted to change, probably resell it, and she is going to take this new home that we bought out at Windsor Square.

Q. What will you do with this particular property?

A. Well, we will sell that property or lease it, or something.

(Testimony of Thomas J. Hughes.)

Q. Will you look at Defendant's Exhibit B-40, drawn payable to Fred Hannon and Sons, marked "threshing grain" in the amount of \$635, in '43, and tell us what that is?

A. Yes, Fred done some threshing for me, threshed grain. I don't remember whether that is barley or wheat, but it is one of the two.

Q. That was on the home ranch, I mean the ranch near Tempe?

A. Well, it is either—that is '43?

Q. June 30th, 1943.

A. I think that is probably on one of the other ranches besides the home ranch, but I am not positive, but it is for threshing grain anyway.

Q. Well, Defendant's B-41, drawn payable to W. A. Rogers, in 1944, amount \$132, marked "baling hay." Do you recall that?

A. Yes, I do. [159]

Q. What was that for, please?

A. Baling hay.

Q. And B-42, drawn payable to Quick Seed & Feed Company, August 30th, 1943, in the amount of \$119. What does that represent?

A. That represents milking machines, Surge Milking Machine.

Q. In other words, you purchased this back in '43, is that correct?

A. Yes, they were purchased back in '43.

Q. Those are used for the milk that goes to the Borden's Creamery?

A. Yes, they have a different concern. Heiskell

(Testimony of Thomas J. Hughes.)  
handles it now. They took the agency away from the other people out there.

Q. B-43, marked payable to Arthur Rogers in '43 for \$444, "baling hay." Do you recall that?

A. Yes, that is correct.

Q. You recall that, do you?

A. Yes, I do.

Q. And B-44, Tony Roma, in '43, for \$16, to cement something. Will you tell us what that refers to, please?

A. Yes, that is for cementing the floor in the home where the foreman lives.

Q. And B-45, another check in '43 drawn payable [160] to Mr. Schlessinger for \$462. What does that represent, please?

A. Well, that represents tillage work there on the land.

Q. What do you mean by "tillage work"?

A. Well, preparing land, plowing it and breaking it and bordering it.

Q. Now, B-46, payable to W. A. Rogers in the amount of \$436, in 1943, for baling hay?

A. Yes, that is for baling hay.

Q. And B-47, to R. Medina, I believe it is, \$92, marked "hauling hay." Do you recall that?

A. Yes, that is Medina.

Q. Medina?

A. Yes, for storing hay on the ranch.

Q. Did he store hay on your ranch at that time?

A. Well, he either stored it or hauled it some place, but I think he stored it.

(Testimony of Thomas J. Hughes.)

Q. Defendant's B-48, May 21st, 1943, to Fred Harmon & Son, \$300, marked "threshing." Do you know what that is?

A. Yes, that is for threshing grain on the ranch there.

Q. Defendant's B-49, W. A. Rogers, in '43, \$623. Can you tell us what that is, please?

A. Yes, that is for baling hay. [161]

Q. B-50, payable to the First National Bank of Arizona, \$375 in '43. Will you tell us what that represents, please?

A. Well, that is a Government bond.

Q. You purchased the bond? A. Yes.

Q. Was that one of the bonds that you were giving to your children? A. Giving to what?

Q. To one of your children; were you giving this bond to one of your children?

A. I think so. I think that is the \$500 bond, 375, I believe, was the price of that.

Q. Now, B-51, payable to P. Fernandez, in '43, \$29, marked "hauling lettuce." Will you please tell us what that is?

A. Well, I think this is some lettuce that we got from some of the lettuce people for feed for the cows. The Mexican people haul it sometimes in their own truck and we pay them so much a load for hauling, but that is what it is.

Q. That is for the cattle that you have on the ranch? A. Yes, it is.

Q. B-52, February 16th, 1943, to the Quick Seed

(Testimony of Thomas J. Hughes.)

& Feed Company, \$100. What is that, please, [162] sir?

A. Well, this is for another machine I think that we purchased there.

Q. Another milking machine?

A. I believe it is. There is nothing else that we got from them only milking machines.

Q. Did you arrange with this Quick Seed & Feed Company to service these milkers from time to time, come out to the ranch and service them?

A. When they put them in, when we bought them, why they agreed to service them occasionally and put them in shape.

Q. What I mean, Mr. Hughes, is did you, from time to time after they were installed, request that their representatives come out and service these machines for you?

A. Well, I think—yes, I think so.

Q. Now, B-53, payable to A. Austin, I believe, marked "hauling hay," in '42. Do you recall that?

A. Yes, I do.

Q. Does it represent hauling hay on the ranch?

A. Yes.

Q. Here also in 1942 a check marked B-54, payable to Smith & Williams, in the amount of \$112.50. Can you tell me what that is, please, sir?

A. I had a man working for me by the name of Collins, and this was money that I put up for him that he bought an automobile. Smith & Williams was the name of the firm.

Q. That was back in '42?

A. Yes.

(Testimony of Thomas J. Hughes.)

Q. Now, Defendant's Exhibit B-55, drawn payable to the Quick Feed & Seed Company in 1942 in the amount of \$150. Is that also for a milking machine?

A. I am pretty sure that it was. I don't know if it was for alfalfa seed.

Q. What was that other check for?

A. I don't recall.

Q. What was the amount of that one?

A. The last one? I could find it for you.

Mr. Laney: The last was \$100.

Mr. Hull: That is right, \$100, February 16th, '43.

A. Well, I think it was for machines. I think another machine was purchased from them.

Q. So you purchased another machine about October 13th, 1942?

A. It must be, because we didn't buy any supplies from them.

Q. Also in '42 was a check drawn to this man Schlessinger, marked B-56. Was that also for preparing land? [164]      A. Yes, it was.

Q. Here is another one, B-57, drawn payable to this same man Schlessinger in the amount of \$212.50 in '42. Was that also for preparing the land?

A. Yes, that is the same.

Q. Of course, when I say "preparing the land," I mean, preparing it for production.

A. Yes, tillage work.

Q. Will you look at B-58, drawn payable to the Maricopa Tractor Company, September 16th, 1942,

(Testimony of Thomas J. Hughes.)

in the amount of \$3.47, and tell us, please, what that is.

A. That is some supplies for a Case Rake, teeth that go in the rake.

Q. That is equipment for a tractor?

A. No, it is for raking hay.

Q. Something you pull with a tractor?

A. Yes.

Q. B-59, payable to the State Tractor & Equipment Company, September 17th, 1942, in the amount of \$6.53. Do you recall what that is?

A. Yes, that is for some supplies for the John Deere disk that they had, that we had.

Q. That also was equipment on the ranch, is that correct, and B-60, August 22d, 1942, Ramon Bernall, \$165, "baling hay"?

A. Yes, that is right.

Q. That is correct? A. Yes.

Q. Do you remember Bernall, has he worked for you recently?

A. No, he has not, I haven't seen him for a long time.

Q. B-61, marked "Gililand's Water Company" in the amount of \$75, July 2d, 1942. Can you tell us what that is, please?

A. I think you are a poor reader.

Q. Maybe I am.

A. What does it say? It is Gililand's Motor Company.

Q. Gililand's Motor Company. A. \$75.

Q. You mean Gililand?

(Testimony of Thomas J. Hughes.)

A. Gililand Motor Company.

Q. You wrote it, didn't you?

A. Yes, I did. That is for repairing automobiles.

Q. That was for motor equipment that you were using on the ranch back in '42? A. Yes.

Q. Now, B-62, I think I can read this one, "Arizona Farmers Production Credit Association," in the amount of \$1031.81, and that is back in July of '42. Can you tell us what that is?

A. Yes, that is the payment of a note.

Q. That you borrowed money?

A. Yes, I did.

Q. Was that cattle or livestock loan or was it a real estate loan? Was it secured by anything?

A. It wasn't secured by nothing.

Q. B-63, July 9th, 1942, payable to Floyd Moore, in the amount of \$624, and refers to the Blake Ranch. Will you tell us what that is, please?

A. For threshing barley.

Q. Do you remember that barley was threshed back there on July 9th, 1942? A. I do.

Q. And June 20th, 1942, to Ramon Bernal, marked B-64, in the amount of \$388.75. What is that, please, sir?

A. That is for baling hay.

Q. And here is another one in '42 to this S. Medina, and it is marked B-65 for identification, marked "hauling hay."

A. That is right, that is hauling hay. It seems

(Testimony of Thomas J. Hughes.)

to me that he hauled a part of it, but that is for hauling hay, that is what it is.

Q. B-66, also '42, payable to William J. Read, in the amount of \$130, marked "final [167] payments on water. Maybe that is "motor," maybe you better look at it and tell me if you know what that is.

A. Did you say that is payment on water?

Q. It is either water or motor.

A. I think it is notes.

Q. I guess that is right. In other words, then, you did make final payment on some notes on June 16th, 1942? A. Yes, final payment.

Q. Do you recall making the payment?

A. Yes, I do.

Q. Now, here is an instrument marked Defendant's Exhibit B-67 for identification carrying some figures on it. Can you just state briefly what that is, please?

Mr. Laney: Is that a check, please?

Mr. Hull: No, I don't know what it is, I am just asking him to identify it. It is a receipt, I think.

A. Well, this was a receipt. Haven't you got a check there for that same amount?

Q. Maybe so, I may have one but I don't intend to put in evidence all of your checks.

A. Well, you have a check that represents this—

Q. Well, what, briefly, does this represent? [168] Will you tell me, please?

(Testimony of Thomas J. Hughes.)

A. It is just a receipt for payment.

Q. Is this for payment of any note?

A. Yes.

Q. Now, Defendant's Exhibit B-68, July 18th, 1942, payable to the Valley National Bank in the amount of \$1015.83. What is that, please?

A. This is in payment of a note and the interest on it is \$15.83.

Q. And another one in '42, B-69, payable to the Valley National Bank in the amount of \$1025.83. What is that, please?

A. Note and interest of \$25.

Q. And May 14th, 1942, marked B-70, payable to Ramon Bernal, in the amount of \$377.

A. That is for baling hay.

Q. B-71, May 14th, 1942, payable to C. Mendez, in the amount of \$30.85. What is that, please, sir?

A. That is C. Mendez, 41 tons of hay. That is for hauling, \$30.85.

Q. I want to show you a document marked B-72 for identification, dated April 14th, 1942. Will you tell us briefly what that is, please, sir?

A. Well, that is a note to the Valley National Bank for \$1000 that I borrowed.

Q. That bears your signature on it, does it? [169]

A. Yes.

Q. That note has been paid, I believe?

A. Oh, yes.

Q. Now, B-73, miscellaneous debit slip, bank slip for the First National Bank, will you tell us what that is, in '42?

(Testimony of Thomas J. Hughes.)

A. Well, it says here, "Rental for one year on safe deposit box 123, receipt attached."

Q. Do you have a safe deposit box?

A. I have one in the Tempe bank.

Q. Is that in your name, your name only?

A. Yes, it is.

Q. Will you look, please, at B-74, and state what that is?

A. This is a thousand dollars—\$100 that was paid.

Mr. Laney: One hundred or a thousand?

A. One hundred. It was charged to my account and credited to Chris T. Martin's account. In other words, I asked them to do that for me and Mr. Haroldson made the charge, and he worked at the bank at the time, charged my account \$100 and credited Chris T. Martin of a hundred.

Q. (By Mr. Hull): Now, Mr. Hughes, you were duly appointed and qualified administrator of the estate of Mr. Martin, weren't you? [170]

A. Yes, I was.

Q. And I think you gave us the date yesterday, did you not, as to when you served in such capacity?

A. Well, I don't remember whether I did or not. I did—

Q. Let me ask you this: If, from March 20th, 1945, up to January 10th, 1947, you did not serve as administrator of the estate of Christopher T. Martin, deceased?

(Testimony of Thomas J. Hughes.)

A. Well, I couldn't tell you. I'd have to look up that record. I don't know.

Q. I don't want to cross you up on the dates, Mr. Hughes, but does that refresh your recollection as to whether or not somewhere during that period you did serve as administrator of that estate?

A. I served as administrator of the estate whenever it was, but I couldn't tell you just exactly the year.

Q. You were appointed by the Superior Court of Maricopa County for that purpose?

A. I was.

Q. During the administration of that estate, it became necessary for you to investigate certain mining claims and mining properties for the estate, didn't it? A. Yes, it was. [171]

Q. And you did make such an independent investigation?

A. Well, Mr. Scott, the attorney, made that investigation. I was laid up, I was pretty badly knocked out with arthritis and he went up to Globe and different places himself and made that investigation. I didn't go up.

Q. Now, Mr. Hughes, you asked the Superior Court to give you additional compensation above the compensation normally allowed for the administration of the estate, on your representation that you did extraordinary services in connection with the administration of the estate?

A. The attorney put that in there, Scott did. I

(Testimony of Thomas J. Hughes.)

don't recall just what it was, but he was the one that put it in.

Q. Would you recognize a statement of that account if I were to show it to you? I'd like to mark this for identification, please.

(The document was marked as Defendant's Exhibit C for identification.)

Mr. Hull: I might state that I want to show you what purports to be a certified, exemplified copy of the order settling administrator's first and final account decree of distribution in that estate certified to by the Superior Court of [172] Maricopa County, Arizona, and will ask you if you recall whether or not you made the representations therein appearing. Would you like to see it?

Mr. Laney: Oh, it doesn't matter.

Q. (By Mr. Hull): I will show you first of all in the certification, on the last page of the order settling the account, or, rather, on the last page of the final account, it is the second document in here, what purports to be verification before Edwin Green, a Notary Public, on the 10th of January, 1947. You just glance at it, briefly, and tell me whether you can identify that as a copy of the report that you made to the Court at the time you closed the estate?

A. Yes, I think this is correct.

Q. And you read the account, did you not, before it was filed, you read it? A. Yes, I did.

Q. And you signed it, did you not?

A. I did.

(Testimony of Thomas J. Hughes.)

Q. Do you recall making that representation in here to the effect, or rather, concerning the inventory and appraisement of the estate, delay in filing it? A. You mean?

Q. I don't want to cross you up, I am just [173] asking you if you recall. If you don't, I won't bother you with it, Mr. Hughes.

A. Well, I remember it all right.

Q. Delay?

A. That is the inventory of the estate?

Q. Yes. A. Yes, it was made up.

Q. I mean do you recall anything that was said by you in the account with reference to any inventory that was filed late? A. No, I don't.

Q. Now, do you recall whether or not you made any representations in here with regard to services which you performed in the administration of the estate; do you recall any of that?

A. Scott put it in. I don't remember what it was.

Q. You did read it and sign it and verify it, did you? A. I think so, yes.

Q. Isn't it true that in addition to the compensation which the Superior Court normally allows to an administrator for the administration of an estate, you were paid an additional sum for extraordinary services in that particular estate?

A. Mr. Scott made—fixed those papers up. I don't know what he put in.

Q. You don't know what you got out of it, do you?

(Testimony of Thomas J. Hughes.)

A. Well, I remember him fixing all the papers up and having me to sign them.

Q. Now, I want to call your attention to Defendant's B-75, which is dated July 11th, 1941, a check drawn to Mr. Schlessinger in the amount of \$200. Is that also for the preparation of the land?

A. Yes, it is, because he didn't do anything else but that kind of work.

Q. So back as early, at least July 11th, 1941, you had dealings with him. Now, also, on July 9th, 1941, and I am referring to B-76, is a check drawn payable to the Hayden Flour Mills in the amount of \$500. What does that represent, please?

A. I think that is for alfalfa seed.

Q. For the ranch, wasn't it? A. Yes.

Q. Now, Mr. Hughes, in response to the subpoena from the Court you brought all of the checks that you had in either of these banks that were drawn on those banks from '41 through to the time designated in the subpoena. I could give you the exact date, if you want it. You did bring them all, didn't you? [175]

A. I brought all that the subpoena asked for.

Q. And they are all in this grip or handbag marked Defendant's Exhibit B for identification, that is true, isn't it, you brought them in?

A. Yes.

Q. And you have no other checks other than those that are in there for that period of time?

A. No.

Q. Did you bring with you in response to that

(Testimony of Thomas J. Hughes.)

subpoena the records of the Hayden Flour Mills showing what purchases or sales were made between you and the Hayden Flour Mills during this period of time?

A. No, I don't have that statement of the Hayden Flour Mills.

Q. You don't have any records?

A. I don't have them.

Q. What is the situation with regard to Tovrea, did you have an account or a statement you could bring in in response to the subpoena that would show what transactions were had between you and Tovreas during that period of time?

A. I could do it this way, that the Tovrea people bought cattle from me and they bought hay and they bought barley. Now, my record book shows the amount on that year. [176]

Q. I see, that will appear in that.

A. But the statements from Tovrea, I don't know where they are. They are probably around home some place, but I couldn't find them.

Q. You did look for them? A. Yes, I did.

Q. Now, Defendant's Exhibit B-77, an instrument on the letterhead of Fred G. Hilvert Company. That is signed by you, is it not?

A. Yes, this is the extension of the lease.

Q. That is the extension of the lease that you told us about yesterday? A. Yes.

Q. And B-78, purports to be a satisfaction of mortgage of record in this County, and bearing your signature. Can you tell us briefly what that is?

(Testimony of Thomas J. Hughes.)

A. Yes.

Q. What is it, please, sir? Is that what it is, a satisfaction of mortgage?

A. It is satisfaction of a mortgage that Christopher Martin had on some land I purchased.

Q. Had you been acquainted with Christopher T. Martin over a rather protracted period of time, a lengthy period of time, before he died?

A. Oh, yes.

Q. When did he die, do you recall? [177]

A. Well, I don't just exactly know when it was.

Q. Were you familiar with his affairs, his personal affairs, his property holdings, and so forth?

A. Well, other than the land I purchased from him. I didn't know much about anything about his mining claims.

Q. Will you please state briefly why you happened to apply for letters of administration to his estate?

A. Well, I owed the estate a couple of thousand dollars, and I spoke to Haroldson, or someone asked him or Ben Robbins, if they would not file letters of administration, and he said he would, but it just kept drifting along and going along, and I wanted to get it cleared up and pay the interest and get the loan cleared up, so Scott told me to just go ahead and file application on administration for it, so I done that and settled up the estate.

Q. Now, Mr. Hughes, who, if anyone, applies for insurance on the ranch properties; I mean your fire insurance and your liability insurance, whatever you may have out there?

(Testimony of Thomas J. Hughes.)

A. Well, Johnnie Joyce writes that I don't know whether I sign the application for it or not, [178] but he writes all of that insurance policies.

The Court: We will have our morning recess at this time. Keep in mind the Court's admonition.

(Thereupon a short recess was taken, after which, all parties being present as heretofore noted by the Clerk's record being present, the trial resumed as follows:)

THOMAS J. HUGHES

resumed the witness stand and testified further as follows:

Cross-Examination—(Resumed)

Mr. Hull:

Q. Mr. Hughes, in the Summer of '47 you took an automobile trip to Flagstaff, didn't you?

A. I think so.

Q. And you made the trip to Flagstaff in one day, didn't you?

A. Yes, we stayed at Flagstaff over night, if I remember correctly.

Q. And then did you return by automobile the next day?

A. I think we went around by the Canyon, by the rim there out the Canyon and come back the next day, if I remember correctly.

Q. Did you accompany your son on that trip as [179] you did when you went to Santa Ana that summer?      A. Well, this is another son.

Q. Now, from time to time back in the latter half of 1941 and up until comparatively recent years, you made frequent motor trips to the dams of the Salt

(Testimony of Thomas J. Hughes.)

River Valley Water Users' Association for the purpose of inspecting those dams, didn't you?

A. Well, I went along with the Council Board. They make trips up there just to look things over and probably once a year. They all go together, 30 of those Council. They generally get a bus and they all go together.

Q. Well, the purpose of going is on official business for the Salt River Valley Water Users' Association, isn't that true?

A. Well, I don't know what you would call it, Council Board. There is two members from the Governing Board and the Council Board. They both go, both members go on those trips.

Q. Do you have your expenses paid when you make those trips?

A. They allow per diem and mileage just the same as they did for a regular meeting.

Q. You get—what you mean is you get so many dollars per day plus your mileage on the automobile, [180] is that it?

A. You get, I think the amount is \$4.10 a day at a meeting, rather.

Q. Yes.

A. And they are paid that same amount, I think, for the day that they go up there.

Q. Now, all 30 members of the Council do not go on this dam inspection trip at one time, do they?

A. Well, sometimes they pretty near all go. They hire one of those large busses to take the whole bunch.

Q. When was the last time you went on one of those trips for the Water Users' for the purpose of inspecting their dams?

(Testimony of Thomas J. Hughes.)

A. Oh, I haven't been on one of them trips for, I think, about three years.

Q. About three years?

A. Three—I don't remember now. I am not positive, but it has been quite awhile since I have been on any of those trips.

Q. In '41 and '42 you made all of those trips, didn't you?

A. I couldn't tell you, I don't know; I don't remember.

Q. Well, when you went on those trips will you [181] just state briefly what was done, what did you do when you went on those trips after you got to the dams?

A. Well, they just look—all of them just had to look at the dams and the construction work that was done and they had their meals up there, took lunch along.

Q. What was the object of going, why did you want to see the dams?      A. Hub?

Q. Why did you go look at the dams; what was the purpose?

A. It is just a custom of the Water Users' that they adopted, or the Council, that once a year, or I think once every two years, I think it is once a year, to make those trips.

Q. And did you, yourself, get out and walk out and check the spillways on those dams?

A. No, I didn't.

Q. Never?      A. No.

Q. What did you do?

A. Well, I just got out and was there on the

(Testimony of Thomas J. Hughes.)

ground where the biggest part of them was, some on the ground, I couldn't go up on—it is pretty steep to go up and I didn't go up. [182]

Q. Do you know Mr. Fred Henshaw?

A. Yes, I do.

Q. Do you know Mr. Orville Knox?

A. Yes.

Q. Did you have occasion to go with them in '41 and '42 on any trips, business trips for the Water Users'?

A. Well, I don't remember whether I did or not, but it seems to me that we had one trip, I believe, maybe we had two, I don't remember.

Q. You recall then, don't you, that early in '42 you took a trip by train to Washington, D. C. for the Water Users'? A. Yes.

Q. And that was a business trip, wasn't it?

A. Well, it was concerning the Water Users' affairs here.

Q. Well, briefly, what was the purpose of that trip?

A. The purpose of the trip was, they were taking up the income tax account that the Government claimed the Salt River Valley Water Users' owed them.

Q. You were one of the accredited representatives of the Water Users', representing the Water Users' in that controversy with the United States [183] Government, weren't you? A. Yes.

Q. Who else, if anyone, went with you?

A. Well, there was Mr. Henshaw, I am pretty

(Testimony of Thomas J. Hughes.)

sure, and I think John Dobson, I am not sure of Dobson, Vic Corbell and Lin B. Orme.

Q. Do you remember when you made that trip; do you remember the month?

A. No, I don't.

Q. It is a fact, is it not, that you spent almost the entire month on that business back in Washington, D. C.?      A. Oh, no, we was only a few days.

Q. You didn't return immediately to Phoenix, though, did you?

A. No, I stopped in Kansas City. The arthritis got to hurting me so awful bad I stopped over there for, well, I think a couple of weeks, and I was very sick in bed. That is where my sister lives, there in Kansas City.

Q. This sister that you referred to when you referred to this 40 acres south of Phoenix, is that right?      A. Yes.

Q. Now, what did you accomplish in Washington, D. C. on that trip? [184]

A. For the Water Users'?

Q. Yes.

A. I don't think we accomplished anything.

Q. What did you do back in Washington, D. C.?

A. Well, they took up the matter and the Board was supposed to write the Internal Revenue, but the Board never passed on it. They furnished them with a lot of information.

Q. Well, did your business consist primarily of conferences with men in Washington, D. C.?

A. Well, it was just with the Revenue Department or that Board that passes on the—

(Testimony of Thomas J. Hughes.)

Q. Mr. Hughes, if it weren't for the pain you say you suffer, you would not have to be disabled, would you, in your opinion?

A. The pain is all the thing that bothers me. It is just simply terrible at times, and sometimes I can't use this left arm and I can't walk sometimes, hardly at all, without pain down in my ankle and my knees and hip, and every time I make a movement like that, now, there is pain right across through here, and move the arm up. Now, it is pain, I can't go any further with it. That hurts awful bad right in here, and this arm, more right in here (indicating right arm), it is just completely knocked out with pain whenever I try to [185] move too much.

Q. Well, then, aside from the pain, you don't know of anything that is the matter with you physically or mentally, do you? A. No, I don't.

Q. You have freedom of movement of your arms and legs, don't you? A. What?

Q. Freedom and movement of your arms and legs.

A. I could move it, but I can't move it without pain. I can't move that arm without pain. Now, it is pain right now. Now, I move it, now that is hurting awful bad. As I come up with it, the pain is terrible.

Q. How long have you been a member of the Council of the Salt River Valley Water Users' Association?

A. Oh, a long time before I got hurt.

Q. About 16 years, is that your best recollection?

A. Oh, I think so, I couldn't tell you exactly.

Q. And what position do you occupy with the Council at the present time?

(Testimony of Thomas J. Hughes.)

A. Well, I am one of the Council members, the Council Board, and at the present time I am the Vice-Chairman of that Board. I was Chairman for [186] it for a number of years, but I am Vice-Chairman for that Board now.

Q. When did you become Vice-Chairman?

A. Well, just lately here, this last Water Users' election.

Q. In '48?

A. Well, when it was, I don't just remember the date.

Q. And during the years '41 up until you were selected Vice-Chairman, you were the Chairman of the Council? A. I was.

Q. Now, you attended all meetings of the Council, did you not, Mr. Hughes?

A. No, I think I missed quite a good many, but I am not sure, the records will show.

Q. The records will show? A. Yes, it will.

Q. You, in your capacity as Chairman, presided at these meetings, didn't you? A. I did.

Q. Then you write the minutes and you sign the official minutes after the meetings are over to make a record of what business was transacted at the Council meeting?

A. Some days I don't sign them right there, [187] maybe I wouldn't sign it until I came back the next time. If my arms are hurting very bad I wouldn't try to sign it, just let it go until the next meeting. A good many of them are passed up that way.

Q. And I believe you told us there were about 30 men on this Council, is that right?

(Testimony of Thomas J. Hughes.)

A. Yes, there are.

Q. Will you tell us, please, what the official function of the Council for the Salt River Valley Water Users' Association is and has been during these six years we are talking about?

A. The Council Board is the law making body of the Salt River Valley Water Users' Association, and the Board of Governors is the administration body. Does that answer your question?

Q. Yes. In other words, your 30 man Council make the laws for your Association, is that correct?

A. By-laws, yes.

Q. Well, during a part of this time, and I am referring now to the latter part of '41 and early in '42, the Salt River Valley Water Users' Association had a special committee known as the Labor Committee, or Labor Relations Committee, isn't that correct?

A. Yes, they had a meeting something similar to [188] that to make an adjustment of claims on power that was furnished to some of the working men. The working men, some of them were given free power and some wasn't charged enough and some too much, and that Committee ironed that out to get it satisfactorily worked with these men that were working.

Q. Well, you were selected as a member of the Committee, weren't you? A. Yes, I was.

Q. You served, did you not? A. Yes.

Q. In what capacity, Mr. Hughes?

A. Well, just as an ordinary member of the Committee.

Q. Were you Chairman of that Committee?

(Testimony of Thomas J. Hughes.)

A. No, not that one.

Q. Was that a sub-committee of the Council?

A. Well, it was, I guess it was a Committee composed of some of the Council and some of the Board.

Q. Do you recall serving on that Committee for about six weeks during the latter part of '41 and January of '42?

A. Six weeks? It didn't take six days.

Q. How many meetings—it didn't take six days?

A. It didn't take very long. I don't remember now just the exact time, but it wasn't very long until they got it all straightened up. While they might have had a recess in between and probably it carried them over for some length of time, but there was no active part done on our part for, I don't know, quite a while.

Q. How long did this Committee function as the Labor Committee?

A. Well, I think that matter they had up there they wound it up probably in a couple of days, but then—well, I think two days, two or three days.

Q. Those were all day meetings, weren't they?

A. No, I don't think so. The meetings were very short. I think we held them in the afternoons, well, not later than ten o'clock, anyway between ten and two.

Q. Let me ask you if you recall whether or not there were some meetings at least of that Labor Committee which lasted from nine o'clock in the morning until six o'clock at night uninterrupted?

A. I don't remember, I can't recall, though.

Q. Now, did you receive compensation for your

(Testimony of Thomas J. Hughes.)

services as a member of the Council of the Water Users'?

A. Yes, just the same as all the rest of them. [190]

Q. Just a per diem? A. Yes.

Q. A nominal per diem of \$4.60?

A. Well, I think that is what it is.

Q. Do you also receive that same pay when you serve as a member of this special Labor Committee?

A. I think it is just the same.

Q. Do you recall how many were on that Labor Committee?

A. I think there were five, but I am not sure.

Q. Mr. Hughes, do you remember whether or not you settled anything, that Committee settled anything as a result of your negotiations?

A. Well, they settled that thing, that trouble between the working men about the price they was to charge for power and all.

Q. And that dispute was brought to your Committee to determine and settle, that is true?

A. They were just to get the information in regard to the different parties that was overcharged on power.

Q. Did you hear witnesses at that hearing?

A. Well, we just went to the different places, a few places where they had men there that claimed they were overcharged on power. I think they brought a few of them in. I don't know. [191]

Q. So far as you know, did you attend all of the meetings of that Labor Committee?

A. Well, I think all but one.

Q. Did you participate in the decision which was

(Testimony of Thomas J. Hughes.)

rendered that ultimately disposed of the controversies that you were then considering?

A. I don't think so.

Q. Was there anything in writing or any written record made of that?

A. I don't think there was, I don't remember.

Q. Were there any written minutes kept of what business was transacted at that particular time?

A. I don't remember whether there was or not.

Q. Are you a member of the Labor Committee of the Council at this time or of the Water Users'?

A. No.

Q. Do you hold any official position with the Water Users' other than Vice Council, Vice-Chairman, rather, of the Council?      A. That is all.

Mr. Hull: That is all.

#### Redirect Examination

Mr. Laney:

Q. Mr. Hughes, counsel for the Company has shown you a large number of checks here and brought [192] from you about your paying checks for baling services, for preparing land, for thrashing, and I will ask you if before you became disabled who did all of that work?      A. I did all of it.

Q. State whether or not you had your own baler there.      A. I owned my own baler.

Q. Did you operate it?      A. I did.

Q. I assume you hired a few hands to help?

A. I had help and I operated it.

Q. You had your own thresher before you were disabled, I take it?      A. And I have it yet.

(Testimony of Thomas J. Hughes.)

Q. Did you operate that before you were disabled? A. I did.

Q. Did you go around plowing and do your own renovating and preparation of the land?

A. I did.

Mr. Hull: Your Honor please, I am going to object to the leading examination.

The Court: Yes.

Mr. Laney: Q. Before you were disabled, who cut and baled your hay before you were disabled?

A. I cut it myself.

Q. And after you were disabled, why, did you employ those custom workers to renovate your land and prepare your land and bale your hay and thresh your grain, and so on; why did you do that?

A. I couldn't do it myself.

Q. Why couldn't you do it?

A. Because I was crippled up.

Q. Now, opposing counsel brought from you that you just hurt, you just have pain. What is the condition of your joints all over your body?

A. Well, they are awful bad. They pain an awful lot.

Q. What, with regard to free movement or being stiff?

A. They are stiff all the time, and the shoulder, this one is awful stiff, (indicating left shoulder).

Q. Now, opposing counsel questioned you at considerable length about being on the School Board. Do you get any pay out of that?

A. None whatever.

(Testimony of Thomas J. Hughes.)

Q. How long were you on the School Board before you became crippled up?

A. Oh, I think some few years. I don't just remember how many.

Q. Now, who is it that actually makes up the [194] budget?

A. Well, the principal makes up the budget, but the Board passes on it.

Q. And who is the principal?

A. Miss Lynd.

Q. Miss Lynd? A. Yes.

Q. Now, as to this position as a member of the Council or the By-law making body, as you say, of the Water Users', have you ever had any compensation out of that other than this nominal amount as counsel calls it, of four dollars and something per day for meetings? A. That is all. That is all.

Q. How many meetings a year about do you have?

A. They have quarterly meetings each year, the Council does, but sometimes they have special meetings. Now, I don't know. We haven't had one this year so far, I don't think.

Q. And on the average, how many meetings a year would you say you have then of the Council?

A. Oh, I think probably we have four a year, and if we have a special meeting that will be five, but sometimes I don't think we have any special meeting at all during the year.

Q. And I will ask you about when—counsel [195] brought from you that you went up to Flagstaff. Did you drive the car? A. No, sir, I didn't.

Q. Who drove it? A. My son drove it.

(Testimony of Thomas J. Hughes.)

Q. When you went around by the Canyon, did you drive it?

A. No, I never did drive it.

Q. And then counsel brought from you about you going on some inspection trip or trips to some dams, or went up and looked. Did you drive up there?

A. No, the Council went in a big bus, all of them together.

Q. And were you able to even walk around on the dam without pain?

A. No, I have not been able to walk around any without pain at all, pain all the time.

Q. And so, then, as to these checks that you paid for the various items here, I will ask you whether or not you would pay them in the due course when the bills came due? A. Yes, I did.

Q. You can still write? A. Yes.

Q. Then how would those various bills come to you; state the various ways that they would come [196] to you.

A. The parties that done the work would come over and bring me a statement of the work that they done and I gave them a check for their money.

Q. Would any of them come by mail, or do you recall?

A. Those contractors and the baling and the harvesting and all of that, they generally drove over to the ranch to get their money.

Q. Now, were you able to go out in the fields to determine when the alfalfa got—ought to be cut and when this and that ought to be done on the farm?

(Testimony of Thomas J. Hughes.)

A. No, I was not. I had a foreman that looks after all of that.

Q. I will ask you whether, before you were crippled up you did all of that?

A. Oh, yes. I didn't have any foreman at all before I got crippled up.

Q. I will ask you whether, to get out around the ranch to be active is necessary in order to properly even supervise it?      A. Sure is.

Q. Now, Mr. Hughes, opposing counsel brought from you that you went on some trip with some officials of the Water Users' back to Washington, [197] D. C. to try to get some relief about income taxes, I believe you said?      A. Yes, it was.

Q. Now, on that trip I'd like to have you relate to this jury just how you got along. Did you take your cane with you then?

Mr. Hull: If your Honor please, I object to that, it is leading.

The Court: Yes.

Mr. Laney: Q. Well, did you or didn't you?

A. Answer it?

The Court: No, it is a leading question.

Mr. Laney: Q. Did you have any trouble or not about your cane? Just tell the jury what happened and how you got along on that, that trip back to Washington.

A. I didn't get along very good. This is the cane that was given to me by my son. I left it here, I didn't take any cane with me, but I had to get one when I was in the hotel. I didn't much need it when I was on the train because I didn't go out of the compart-

(Testimony of Thomas J. Hughes.)

ment, but when I got to Washington at the hotel, why, Mr. Orme got hold of the porter there and we got one from him so I could use it to go around.

Q. How did you feel? Describe to the jury how [198] you were.

A. Couldn't walk at all without pain and couldn't get along at all without that cane.

Q. And then on your return back you say you did go to some city in the Mid West?

A. Well, I stopped in Kansas City.

Q. What was your condition while you were there?

A. Well, I was in a pretty bad fix. I had more pain than I ever had, you might say, because I think it was pretty cool there, and damp weather.

Q. Now, opposing counsel asked you if you had any other trouble except pain. I will ask you to state what effect, if any, upon the pain it has if you try to do any work?

A. Well, it bothers me so much here in the spine, up here, it just makes me sick at my stomach. I got to lie down.

Q. And if you tried to move about in the fields what effect does it have, if any?

A. Well, the same effect. It just pains all over, my knees and ankles, joints, all pain.

Q. Oh, counsel brought from you something about the equivalent of four years in college. How long did you spend over at—I believe he brought from you you spent some time in the old Tempe Normal School? [199]

A. Yes.

Q. Well, what kind of courses did they have

(Testimony of Thomas J. Hughes.)

there? State whether you went direct from Grammar School into that Normal School?

A. Well, this course they had here was the teachers' course, three years' course.

Q. Pardon me. Just answer my question. Did you have to graduate from High School before you went into the Normal at that time, or did you go into the Normal direct from the grade school?

A. Well, Mr. Laney, the school I went to, after I left the country school, was the Kansas Normal College.

Q. You went direct from the grade school?

A. Yes, the Kansas Normal College, to finish up and take science studies. I went to this Territory Normal, I think it was two years.

Q. Now, opposing counsel brought from you that your farms made more money now than they did back in '40, I believe you said, or '41. Just briefly, why is that?

A. Well, the increased price in the stuff that you sell.

Q. Everything up?

A. Everything has gone up but the taxes now are cutting in on that. [200]

Q. Now, when they talk about your nine hundred or thousand dollar milk check per month, what do you pay the milker, the man that has charge of that, how much a month approximately do you pay him?

A. Well, his runs probably \$190 a month.

Q. And you furnish him a house and you furnish him his milk?

A. Lights and water and everything.

(Testimony of Thomas J. Hughes.)

Q. I believe you said you have a foreman there for approximately \$50 a week, is that right?

A. Yes.

Q. And furnish him that, and then you have to pay these various expenses, power?

A. Expenses, power and all of the expense.

Q. Now, opposing counsel brought from you that you served as administrator in an estate at some time. Now, who did all the work in connection with that?

A. Well, Mr. Green and Scott there.

Q. The local attorneys? A. Yes.

Mr. Laney: And, may it please the Court, I think I am just about done, but may I check my notes just a few moments and see if there is something—the examination was quite long, so if we [201] could adjourn now.

The Court: Well, you have five minutes. Go ahead.

Mr. Laney: Well, all right, I have to read this through. I haven't seen it.

Q. Now, Mr. Hughes, counsel brought from you that there was something in the way of an inspection done by the attorney in connection with this estate matter, some investigation. Were you able to make any such investigation yourself?

A. No, I wasn't, Scott made it, Scott and Green.

Q. Did you make any? A. I never did.

Mr. Laney: That is all.

Mr. Hull: That is all.

(The witness was excused.)

The Court: We will suspend until 2:00 o'clock. Keep in mind the Court's admonition.

(Thereupon a recess was taken at 12:00 o'clock, noon.)

2:00 o'clock, p.m.

All parties being present as heretofore noted by the Clerk's record, the trial resumed as follows:

Mr. Laney: Mr. Crane. [202]

ALEX D. CRANE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct Examination

Mr. Laney:

Q. What is your name, please, sir?

A. Alex Crane.

Q. What is your profession?

A. Certified Public Accountant.

Q. And duly licensed and practicing as such here in Phoenix, Arizona? A. Yes, sir.

Q. And, Mr. Crane, I will ask you whether, at our request, you have made some computations of figures and interest in connection with this case?

A. Yes, sir.

Q. Now, Mr. Crane, just assuming for the sake of the computation, an amount of money falling due, an amount of \$228.02 falling due on June 30th, '42, and then the same amount on June 30th, 1943, and '44 and '45, '46 and '47, making the six payments, the principal amount of that would be how much, of those six? A. \$1,368.12.

Q. \$1,368.12. Now, Mr. Crane, what have you [203] computed the amount of interest at six per cent per annum upon those six payments of \$228.02 up to January 31st, 1948? A. Yes, sir.

Q. And what amount of interest is that?

A. \$253.08.

(Testimony of Alex D. Crane.)

Q. \$253.08. That is interest to January 31st, 1948, is that correct? A. That is right.

Q. Then I will ask you, Mr. Crane, just to give me the total, if you got the total of that.

A. \$1,621.20.

Q. Then assuming, Mr. Crane, that there was a payment of \$78.11 due on February 1st, '42, and then that same payment of \$78.11 due on the—was due on the first day of each and every month thereafter up to and including the month of June of 1945, then assume that after June 1st, '45, there became then due on the first day of each and every month thereafter the sum of \$104.14, I will ask you whether you have figured the amount of the principal, that is, inclusive of interest on those payments?

A. Yes, sir.

Q. And how much of those?

A. The principal of \$78.11 due each month up to [204] June, 1945, is \$3,202.51.

Q. \$3,202— A. 02.51.

Q. 51. A. That is \$78.11.

Q. That is the principal on \$78.11 payments to—that is what date?

A. To June 1st, '45. From July 1st, '45 to January 31st, '48, the principal on \$104.14 is \$3,228.34.

Q. \$3,228.34? A. Yes, sir.

Q. Total and principal then?

A. Yes, \$6,430.85.

Q. And then that second item was principal on, what was that? A. \$104.14.

Q. That is to January 1st? A. '48.

Q. And now have you computed the amount of interest at six per cent per annum on each of those

(Testimony of Alex D. Crane.)

monthly assumed payments up to January 31st, '48?

A. Yes, sir.

Q. Pardon maybe those are payments—

A. January 31st— [205]

Mr. Laney: Q. January 31st instead of January 1st. And how much is that interest?

A. Well, the interest on the \$3,202.51, which is the \$78.11 payments, is \$832.65, and the interest on the other amounts, which is the \$104.14 payments is \$258.27.

Q. Then the total of the principal and interest on both the \$78.11 payments and the \$104.14 payments would be how much? A. \$7,521.77.

Q. \$7,521.77?

A. Yes. That is the principal and the interest.

Q. And then assuming those payments that we first asked about, supposedly the annual premium payments, get that back, that \$1,621.20 with the interest? A. That is right.

Q. And adding that then to the 75—to the amount of the principal and interest of the monthly alleged benefit payments, that total amounts to what?

A. I haven't got that.

Q. Well, do it right quick. I will ask you if I am doing it right here, \$9,142.97.

A. That is correct, \$9,142.97.

Q. Then that would be, assuming these payments [206] are due, the principal and interest, that is the total principal and interest to January 31st?

A. '48.

Q. '48. Now, Mr. Crane, I will ask you whether at our request you have computed the interest on these

(Testimony of Alex D. Crane.)  
several principal sums that we have spoken about,  
not the interest on interest, but interest on the prin-  
cipal sums then from January 31st, 1948, to date?

- A. I have.
- Q. And what is the total amount of that interest?
- A. Well, the total amount—the interest on the \$1,621.20 is \$58.59, and on the other amount, \$6,430.85 is \$275.62.
- Q. Now, that is all at six per cent per annum?
- A. Yes, sir; that is the total of \$9,477.18.
- Q. Then that is the total of principal and interest on this hypothesis to the present date?
- A. That is right.
- Q. \$9,477.18. Thank you. You may take the witness.

Mr. Meason: No questions.

(The witness was excused.)

Mr. Grant Laney: Mr. Painter. [207]

### ROY PAINTER

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Laney:

- Q. State your name, please.
- A. Roy Painter.
- Q. Where do you live, Mr. Painter?
- A. About three miles south of Tempe.
- Q. Do you live not far from the Tom Hughes ranch? A. Not very far.
- Q. Do you know Tom Hughes? A. Yes.

(Testimony of Roy Painter.)

Q. How long have you known him?

A. Since about 1917 or '18.

Q. I will ask you if you noticed any change in his physical condition along about 1935 or thereabouts?

A. I did.

Q. And what did you notice in that respect?

A. I noticed he is getting awful stiff.

Q. Did you see him frequently from '35 up until the present time?      A. I did. [208]

Q. Have you been to his place many times?

A. Many times.

Q. I will ask you if you are serving on any school board?      A. Yes, sir.

Q. And what school board is that?

A. Rural School 13.

Q. And is that the same board that Mr. Tom Hughes is a member of Board of Trustees?

A. Yes.

Q. I will ask you where you hold your meetings of that school board?

A. Sometimes at the school house, sometimes at Mr. Hughes' house.

Q. Do you hold those very often at Mr. Hughes' home?      A. Quite often.

Q. Why do you hold them at his home?

A. Because he is not able to come to the school house.

Q. He is not able because of what?

A. Because of his arthritis, or whatever it is.

Q. Because of his crippled up condition?

A. Yes.

Q. I will ask you to state whether or not, in con-

(Testimony of Roy Painter.)

ducting those affairs of the Board of Trustees [209] of the School District, if it is often necessary for the members to sign certain papers and documents?

A. It is.

Q. Where are those signed?

A. Where we meet, either at the school house or at his house.

Q. Do you sometimes take those papers to his home for him to sign them? A. I do.

Q. And why do you do that?

Mr. Hull: I object to that, calls for a conclusion.

The Court: Yes, I think so.

Mr. Laney: Q. Now, in all the time that you have seen Mr. Hughes since the year '35, have you ever seen him drive a tractor?

A. I have seen him try to.

Q. How many times?

A. I think only once.

Q. And did he drive it? A. Not very long.

Q. And just tell the jury what you observed about his condition, about his driving a tractor at that time?

A. Well, he got so sore that he got sick. [210]

Q. Did he complain of pain at that time?

A. He did.

Q. Now, during the period of time from '35 to the present time, has he complained of pain to you?

A. Many times.

Mr. Hull: Now, I am going to object to this entire line of questioning, because it is entirely too leading, counsel is testifying. This witness is capable of doing that.

The Court: Yes.

(Testimony of Roy Painter.)

Mr. Laney: Q. What have you observed about the way Mr. Hughes gets around and walks?

A. He gets around with a cane the best he can.

Q. And what else have you observed about his ability to move about?

A. Well, he is very stiff.

Q. Now, I believe you stated awhile ago that you —well, I will reframe it. Have you ever seen Mr. Hughes do any work at all since '35?

A. Very few times.

Q. Do you remember any of those occasions?

A. Yes, once he tried to drive a tractor. He was scraping borders.

Q. What was the result of that, just tell the jury.

A. Well, he had to quit. [211]

Q. Where did he go? A. Went to the house.

Q. Did you notice what he did when he went to the house? A. He laid down.

Q. Have you seen him lay down on other occasions?

A. Pretty near every time I go there he is either laying down or sitting down.

Q. Have you ever seen Mr. Hughes walking out over his farm?

A. No, as far as he ever gets is at the barn, about a hundred yards, probably.

Q. Well, from your observation of Mr. Hughes over these years, are you able to say whether or not, in your opinion, he could do any work on his farm?

Mr. Hull: I object to that as calling for a conclusion of the witness.

(Testimony of Roy Painter.)

The Court: Sustained.

Q. (By Mr. Laney): Now, before the year '35, before Mr. Hughes got disabled, what did you observe—

Mr. Hull: I object to that, because he is calling for something not supplied by this witness, nothing, no showing here from this man that Mr. Hughes is disabled.

Mr. Laney: All right, we will withdraw the [212] question.

Q. Before Mr. Hughes got in this condition that you have described here on the witness stand, what did you observe about his working?

A. Well, he did all of his own work, baling hay, thrashing, plowing and disking.

Q. How is that work done on the Hughes farm now or since he became—

Mr. Hull: He has not shown he knows how the work is done.

Mr. Laney: Well, withdraw it then.

Q. Do you know how Mr. Hughes has had his work done on his farm since he got in this condition that you have described on the witness stand?

A. Yes.

Q. How? A. Contract.

Q. Contract. That is, custom people?

A. Custom contracting.

Q. Explain to the jury what you mean by "custom contracting."

A. Well, there is a bunch of men around the Valley that does different kinds of jobs like baling hay,

(Testimony of Roy Painter.)

thrashing, plowing, disking and renovating. He hires those to do his work.

Mr. Laney: Take the witness. [213]

Cross-Examination

Mr. Hull:

Q. Mr. Painter, in '47 there was quite extensive negotiations, were there not, with Mr. Solaris, of Guadalupe, as to the leasing or purchasing of a building owned by him for the school there, by the School Board? A. Yes.

Q. Now, during these discussions and negotiations, just tell us whether or not Mr. Hughes, in his capacity as a member of the Board, was present and took part in the discussions?

A. He was out there one time.

Q. Now, was that in regard to the leasing or the purchasing of that building to be used by the School Board?

A. We talked to him about purchasing it, but we had no way of buying it without a bond issue and you could never get that School District to vote a bond issue for the Yaqui Village.

Q. Then you didn't buy the building for \$1800?

A. Mrs. Roberts bought the building. Mr. Solaris said if we didn't buy it he was going to sell it. Mrs. Roberts bought the building and is leasing it to us.

Q. In other words, the School District did not buy the building, somebody else bought the building and you are leasing it?

A. The School did not buy it, had no funds to buy it with.

(Testimony of Roy Painter.)

Q. What is your business, Mr. Painter?

A. Farming.

Q. Now, you have testified that prior to '35, that Mr. Hughes did all of his own thrashing, baling, disk-ing, plowing, harvesting of all of the crops and did all of his farm work. Did he do that all alone?

A. No.

Q. He employed labor?

A. He employed labor.

Q. He employed regular and extra regular help as the needs of the farm and the production of the farm called for?

A. He employed both kinds of labor.

Q. Do you do all of your own disk-ing, plowing—

Mr. Laney: I object to the question as to what he does.

The Court: Yes, I will sustain the objection.

Q. (By Mr. Hull): You have testified, Mr. Painter, that Mr. Hughes does all, or substantially all, of the preparation of his ground, his farming and the harvesting of his crops by contract? [215]

A. That is right.

Q. I will ask you, Mr. Painter, if that is not the usual custom, practice and usage of the farmers in Maricopa Valley, farming any substantial acreage at all, now to contract practically all of the tillage, preparation of your soil, for thrashing, baling, and har-vesting of their various crops?

A. Not on preparing land. For threshing and bal-ing, yes.

Q. How about the preparation of the land?

(Testimony of Roy Painter.)

A. Preparation, why, the vegetable growers, I should judge about half of them contract their preparation of land, but the diversified farmer does not.

Q. All right, in the preparation of hay, of the land for growing alfalfa, is it the usual custom and practice of contracting that, or doing it alone?

A. We always did it ourselves.

Q. One man could take a tractor and prepare the land for planting for alfalfa?      A. Yes, sir.

Q. Assuming that Mr. Hughes were younger, and so forth, he could do that himself?

A. He could do it on a certain amount of land.

Q. Well, let's confine that, Mr.—I am sorry [216] I didn't do that before, but confine it to the 160 acres that Mr. Hughes has, known as the home and the Blake place. Could he take care of that?

A. No, he couldn't take care of all of it, to do the work there.

Q. Well, he would not be able to prepare that for planting, to take care of the crop while it was growing and to harvest it all by himself, just too much land for one man to handle?

A. Too much land for one man to handle.

Q. Especially when you consider he has some 60 odd head of cattle to take care of at the same time, and by "cattle" I mean dairy stock to milk; I am not referring now to the ranch cattle, it would not require any particular amount of attention, but you take into consideration the fact of the dairy, it would be impossible for one man to conduct all of that business, would it not?

(Testimony of Roy Painter.)

A. 50 head of cows is one man's job to milk and take care of.

Q. Regardless of the condition of the individual physically? A. That is right.

Mr. Hull: That is all. [217]

#### Redirect Examination

Mr. Laney:

Q. Well, one man with the usual amount of hired help that a farmer employs could take care of it easily, couldn't he? A. Yes.

Mr. Laney: That is all.

Mr. Hull: That is all.

(The witness was excused.)

Mr. Laney: Mr. Evans.

#### H. A. EVANS

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Laney:

Q. State your name, please.

A. H. A. Evans.

Q. Are you a neighbor of Mr. Hughes?

A. Yes, sir.

Q. You have known Mr. Hughes about 13 years, haven't you? A. About 11½.

Q. Are you a farmer?

A. I have farmed, I am not farming now. I have.

Q. Do you live on that farm? A. Yes, sir.

Q. Have you seen Mr. Hughes frequently since

(Testimony of H. A. Evans.)

you have known him those 11½ years? A. Yes.

Q. Have you been at his place many times?

A. Many times.

Q. What has been his physical condition since you have known him?

A. Well, you come into his house, you find him in a chair and he gets up, you can see that he is kind of, makes an effort, you know, to move around. Sometimes you will find him lying on the cot in the living room.

Q. Now, do you ever drive Mr. Hughes places?

A. I have driven him above five or six times to Phoenix, he couldn't use his arms, so he asked me if I'd go to town to pick him up. He had to go to the Water Users', you know, also once or twice to the doctor. Of course, I don't know exactly for what purpose. Pretty hard to remember.

Q. And what did you observe about his way, the way he got around, his ability to walk?

A. Well, not very capable to walk.

Q. Just tell the jury what you know about that.

A. Well, you know, he kind of limps, and [219] one time I was walking with him to the basement to the Water Users', and he was holding on, you know, to me. There is a few steps down there. He was scared he was going to fall over.

Q. Have you ever seen Mr. Hughes drive a tractor or do any work on his farm? A. No.

Q. Does he milk?

A. I never was to his barn.

(Testimony of H. A. Evans.)

Q. But you have never seen him do any work at his farm since you have known him?

A. Oh, I have seen him sometimes from the highway in the pickup kind of looking at his place.

Q. Have you ever seen him out walking in his fields or going out in his fields?

A. No. He's got a pretty good sized job. Sometimes on the lawn I have seen him, but not in the fields.

Q. At the time you saw him walking, where was he walking?

A. Near the house, on the lawn. He has got a lawn in front of his house.

Q. You spoke awhile ago of seeing him lying down. How many times, would you say?

A. Well, I make his place about eight or nine times a year, you know, so it is pretty hard to [220] remember, maybe two or three times—four times.

Q. Does he use anything to help him out in walking? A. That cane, the cane he uses.

Q. Has he always used a cane since you have known him? A. Since I have known him.

Mr. Laney: Take the witness.

Mr. Hull: No questions.

(The witness was excused.)

Mr. Laney: Mr. Freestone.

### GEORGE L. FREESTONE

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Laney:

Q. State your name, please.

A. George L. Freestone.

Q. Where do you live, Mr. Freestone?

A. East of Mesa on the Gilbert Road near the Temple.

Q. What is your occupation? A. Farming.

Q. Do you know Tom Hughes? [221]

A. Yes, sir.

Q. How long have you known him?

A. Oh, about 25 or 30 years.

Q. Have you had occasion to go to his home?

A. Yes.

Q. How often?

A. Oh, I wouldn't say how often, several times.

Q. Are you on the Council of the Water Users'?

A. Yes, sir.

Q. And how long have you been on the Council?

A. I think about 15 years.

Q. And I will ask you if you ever called at the Hughes Ranch for Mr. Hughes in connection with Council meetings? A. Yes, sir.

Q. Just tell the jury what you observed at Mr. Hughes' house, why you went there.

A. Well, I went there because I understood, in fact, I knew he was unable to handle his own auto-

(Testimony of George L. Freestone.)

mobile to attend these meetings of the Council, so I went up there to pick him up, to take him over to these meetings, that he might be able to attend these meetings. I also brought him back.

Q. What did you observe about his condition, physical condition?

A. Well, I have always observed that for the [222] last several years, that he was very much handicapped in getting around.

Q. And what did you observe about his ability to get in and out of an automobile?

A. It was very hard for him to get in and out, sometimes I have to help him.

Q. Now, have you ever gone to his place when he didn't go anywhere with you or when he didn't go out of the house?

A. Well, I don't remember. I don't remember it, of an occasion of that kind.

Q. Well, when you called for him to take him to the Council meeting, did he always go?

A. I think with the exception of once or twice he always went.

Q. What was his condition on those occasions?

A. Well, he felt as though he wasn't able to go.

Q. Was he up or in bed, or what?

A. Well, it usually seemed to me he had a cot out on the porch. I am not sure that he was lounging around. It seemed to me like he had some kind of a place or something that he would lounge around on.

Q. What did you observe about Mr. Hughes' ability to walk? [223]

(Testimony of George L. Freestone.)

Q. Did he use any—

A. He used a cane; in fact, he used a cane all the time practically, and I have seen him on crutches.

Q. And in all of the time that you have known him since?

A. Yes—practically since I have known him, this condition the last eight or ten years.

Q. Did you ever see him do any work on his farm?

A. I never did.

Mr. Laney: Take the witness.

#### Cross-Examination

Mr. Hull:

Q. Mr. Freestone, you have been a member of the Council? A. Yes.

Q. That is the Salt River Valley Water Users' Council since how long? A. Yes, sir.

Q. When did you first go on the Council?

A. I don't know what year it was, it was about, maybe 12 or 15 years.

Q. You have been a member since '41? [224]

A. Yes.

Q. During this period of time, Mr. Freestone, have you attended the meetings; that is, the regular and the special meetings of the Council regularly when you were here?

A. Always when I was at home. A time or two I was away, and of course, when I was away I didn't go.

Q. Unless you were away, at all times you attended the meetings? A. Yes, sir.

(Testimony of George L. Freestone.)

Q. You have missed none of the meetings because of illness yourself? A. No, sir.

Q. Now, as a member of the Council, Mr. Freestone, did you make any of these inspection trips to the various dams? A. Yes.

Q. During the period, of course, June, 1941, and the present time? A. Yes.

Q. On the inspection trips which you made in company with the other members of the Council to the dams, did Mr. Hughes accompany you on those trips? A. Yes, I think he did. [225]

Q. Do you remember what the means of transportation—what means of transportation was used?

A. Automobiles.

Q. Private automobiles?

A. Most of them private automobiles. Some of them they had a few busses, but that was the way I—that is my way of going, was by my own automobile.

Q. What dams are we referring to when we say “dams” that the Council members went to on inspection trips?

A. Well, it was—what is that new dam of ours?

Q. Would it be Roosevelt, Horse Mesa, Canyon Lake?

A. Canyon Lake, or those dams—well, not Canyon Lake either. It was up on—

Mr. Laney: Was it Stewart Mountain?

A. Stewart Mountain, yes.

Mr. Hull: Stewart Mountain and Horseshoe?

A. Yes, Stewart Mountain and Horseshoe.

Q. Did Mr. Hughes perform the duties as Chair-

(Testimony of George L. Freestone.)

man of the Council in a good and businesslike manner at all times?

A. Whenever he was there, and he was there most of the time, I think.

Q. And as far as taking care of the business of the Water Users' Association, he was entirely [226] capable, was he not?      A. Absolutely.

Q. And has, in fact, been very capable and a very excellent member of the Council?

A. I would say so.

Q. In furthering of the business of the Salt River Valley?      A. Yes, I would believe so.

Mr. Hull: I believe that is all.

Mr. Laney: That is all.

(The witness was excused.)

Mr. Lynn Laney: Miss Lynd.

### LOUISE LYND

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Lynn Laney:

Q. What is your name, please?

A. Louise Lynd.

Q. What is your profession, Miss Lynd? It is Miss Lynd, is it?

A. Yes. I am Rural Supervisor for the State Teachers College in Tempe.

Q. And as such do you have anything to do with [227] the particular school on the Board of which Mr. Hughes is a member?

(Testimony of Louise Lynd.)

A. Yes, we use that school for a training school for rural teachers.

Q. For the State College at Tempe?

A. For the College.

Q. You know Mr. Hughes, of course?

A. Yes.

Q. About how long have you known him?

A. Well, he has been on our Board 13 years, and his children went through our school, and the youngest one is a practicing physician. That is practically a long time.

Q. Now, Miss Lynd, during this period, we will say from '35 on to the present time, what have you observed as to Mr. Hughes' physical condition?

A. Well, he has been increasingly lame. He has always walked with a cane since he has been on our School Board, I think.

Q. And what have you observed as to his ability to get around and walk?

A. Well, it is very hard for him.

Q. And as to the work on the School Board there, who prepares the budget for the submission to the Board?

A. We have a bookkeeper who keeps track of all [228] the accounts and she and I make the budget.

Q. And that is then submitted, I suppose—

A. That is submitted to the Board.

Q. And then who employs the teachers, who directs them?

A. I do. That was the understanding with the College when we took over these schools for training that I should have the employment of the teachers.

Q. Now, what have you observed about Mr.

(Testimony of Louise Lynd.)

Hughes' health in connection with any Board meetings?

A. Well, he often comes when we feel he should not, and his wife feels that he should not, and when he gets there—we only live on the other side of the mile from him, and I go to his house when he can't come and we have the papers to be signed, we take them to him if there are teachers in town.

Mr. Laney: That is all. You may take the witness.

#### Cross-Examination

Mr. Hull:

Q. Now, Mr. Hughes' activity as a member of the School Board during—there are a few questions I will ask you, and I will refer to him in that capacity only—he is always consulted, is he not, [229] by other members of the Board and by yourself?

A. Oh, he is.

Q. In all questions relating to the welfare of the School District? A. Yes.

Q. And his information in that respect is of value to all of you? A. Yes, it is.

Q. Is he capable in his handling of the affairs for the School District?

A. Yes. There isn't a very great deal of handling.

Q. There are decisions to be made?

A. There are decisions to be made and we are always calling for his opinion.

Q. On matters of policy, probably, rather than administration? A. Yes.

Mr. Hull: I think that is all.

Mr. Laney: Thank you.

(The witness was excused.)

Mr. Grant Laney: Mr. Charles Saylor.

### CHARLES SAYLOR

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows: [230]

#### Direct Examination

Mr. Grant Laney:

- Q. State your name, please.  
A. Charles Saylor.  
Q. Where do you live?  
A. Well, I am now living in Tempe.  
Q. And what is your business or occupation?  
A. Well, now, and it has been for ten years, custom hay baling.  
Q. Do you know Tom Hughes? A. I do.  
Q. How long have you known him?  
A. Oh, I have known him since about '30.  
Q. Do you recall anything or any change in his physical condition about the middle of the thirties, along '35, somewhere along there?  
A. Well, yes. When I first knew of him, why, he didn't use a cane, and along in, about that time, '34 or '35, why, he was using a cane.  
Q. Did you observe what kind of work he did before he started using his cane?  
A. Oh, yes, he drove a tractor, plowing and combined it, and he even baled his own hay.  
Q. And thrashed his own grain, did he?  
A. Yes.  
Q. Now, after—about the year '34, '35, as you [231] say, what did you observe about his working?  
A. Well, I observed why he was hiring more tractors to do it. He was letting up on it.

(Testimony of Charles Saylor.)

Q. And since along about the middle of the thirties, have you ever seen him do any work himself?

A. No, I didn't.

Q. What would you say about his ability to get around?

A. Well, he needs a cane and he seems to be stiff, crippled.

Q. Now, have you been at his home?

A. I have.

Q. And have you noticed whether or not he is up and about all the time?

A. Well, in collecting for my baling he was always in the house, and I don't know, he would always answer the door.

Q. Well, have you ever seen him lying down?

A. Well, yes, I seen him lying down. He was out in the yard swing one day when I drove in. He was lying down.

Q. When you go there to do this custom hay baling does he come out in the fields and supervise it?

A. I don't believe I have seen him over three [232] or four times.

Q. In the field? A. In the field.

Q. How many times have you been there baling hay?

A. Oh, I baled, I must have baled ten or twelve times over a period of years from '37 up to about '30—or '46.

Q. How many times a year would you bale?

A. Well, there was one year there that I had all of his baling, in '38, I believe. It was three crops.

Q. Have you ever seen him drive a tractor?

(Testimony of Charles Saylor.)

A. I have not.

Q. Have you ever seen him do any other kind of work? A. I have not.

Q. Did he ever complain of pain to you, his arthritis?

A. No. The only thing he ever said one day, he was down in the field in his truck and he said, "I have got to get back to the house and lay down." That is all he said.

Mr. Laney: Take the witness. [233]

#### Cross-Examination

Mr. Hull:

Q. Mr. Saylor, you testified that in the middle thirties or around '35 and thereafter, that Mr. Hughes apparently did more farm contracting than he did previously.

A. Well, what I meant by that, then, it was about that time that I noticed he started hiring more work done.

Q. Were you in the contract baling business at that time? A. Well, no, I wasn't until '36.

Q. Were you living in the Valley?

A. I had been living within three miles of his place.

Q. Were you either engaged in or acquainted with the business of farming and ranching in the Valley prior to engaging in the contracting business?

A. Yes.

Q. Isn't it a fact, Mr. Saylor, that prior to the middle thirties, that there was—it was the usual custom of the farmers to do as little contracting as possible? A. Well—

(Testimony of Charles Saylor.)

Q. In other words, wasn't the depression still [234] on then?

A. Yes, the depression was still on.

Q. And after the thirties, after the middle thirties, excuse me, let's put it and make it more confining to after '35, did not the farm contracting business pick up considerably throughout the Valley?

A. Well, in some instances, yes.

Q. More farmers would, starting during that period, let contracts for farming, for the preparation and planting, tillage of the soil, this preparation of the soil? A. Yes.

Q. And all phases of farming were contracted more than they ever had been before? Did I make myself clear? A. No, I don't get you.

Q. I will reframe my question; I got mixed up myself. The contracts—did not the contracts or contracting for farming crops; that is, plowing, preparation of the land for planting, planting and the harvesting of crops become more extensive in the Salt River Valley after '35 than it had been prior thereto?

A. Well, just heavy work maybe subsoiling or plowing, but when it come for the farmers who had [235] all of their equipment to put in their own grain and everything that naturally they would not hire it done.

Q. They would do the planting?

A. Yes, they would do the planting.

Q. They would do their own planting?

A. And preparation for the planting.

(Testimony of Charles Saylor.)

Q. Now, explain to us what you mean by "preparation"?

A. Well, irrigating, disking, and drilling.

Q. It was the practice for farmers to do all of their own irrigating?

A. If they had hired help.

Q. They practically always had to hire help to do their irrigating? A. Practically all.

Q. Hired help for disking and planting?

A. Yes.

Q. The same was true in baling hay?

A. If he baled his own hay he had to have hired help. If he baled his own hay, naturally he would have hired help.

Q. Threshing would be the same?

A. Threshing.

Q. Now, you stated that when you would come to Mr. Hughes' ranch to collect your money for your [236] baling operations or threshing operations, that you found him on a number of occasions inside of the house?

A. Well, he was in the house on except one occasion.

Q. Now, isn't it true, Mr. Saylor, that other farmers from whom you collect also were in their house when you called upon them for payments?

A. No, very seldom.

Q. They were always right there?

A. They were hiding from me, all the others were hiding from me.

Q. They were hard to find, but Mr. Hughes couldn't get away?

(Testimony of Charles Saylor.)

A. No, he couldn't get away.

Q. Now, you mentioned also that during those 12, 13 or 14 times, I think it was, and I am not quibbling about the number of times that you worked for Mr. Hughes, that he appeared in the fields two or three times, whatever it was? A. Yes.

Q. And wasn't it the practice of other farmers and ranchers for whom you baled to remain in the field at all times that you were in there with the baler and the crews?

A. No, my customers as a rule, the general [237] principle with other customers was, they were always out in the field at least once a day to see if the hay was too green or too dry, or if it was ready to bale. Mr. Hughes, if he did come out, he does talk with me, but never got out of his pickup. There is a drive alongside of the field and he would ask me what I thought of it. There has been times I drove up and asked him, I thought it was too green. "Well," he says, "shut it off awhile."

Q. You are an expert, aren't you, on whether or not grain is ready for threshing or hay is ready to bale? A. Well, I am supposed to be.

Q. I am not quibbling, and your word can be taken when the other farmers asked your opinion, is it not?

A. They do if they come out and check on me.

Q. Depend on your judgment? A. Yes.

Mr. Hull: That is all.

Mr. Laney: They come out in the fields and supervise it, don't they? A. Yes, they come out.

Q. Mr. Hughes didn't? A. No. [238]

Mr. Laney: That is all.

(The witness was excused.)

Mr. Lynn Laney: Mrs. Hughes.

### STELLA C. HUGHES

was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

#### Direct Examination

Mr. Laney:

Q. What is your name, please?

A. Hughes.

Q. Your first name? A. Stella C. Hughes.

Q. And you are the wife of Mr.—of the plaintiff, Mr. T. J. Hughes? A. I am.

Q. How long have you people been married?

A. Since early in '18.

Q. Now, Mrs. Hughes, I will ask you whether you remember any change in Mr. Hughes' health along in the early thirties? Just say yes or no, whether you remember. A. No.

Q. Well, what about along in '35, did you observe it? [239]

A. Yes, I noticed that he was beginning to get stiff and he complained of pain a whole lot in his shoulders and his back.

Q. I will ask you whether from '35 on to the present time, that has remained the same or gotten better or gotten worse?

A. Well, I would say it has gotten worse.

Q. And during the time from '35 up until the present time, has Mr. Hughes, within your knowledge, made any effort to drive a tractor?

(Testimony of Stella C. Hughes.)

A. Well, I have seen him try to show a new man how to drive it, and I have seen him get on the tractor and maybe drive it down to the barn. The boy would go along with him, but I knew what was coming. Pretty soon he would come to the house and be in terrible pain and have to take aspirin and put the electric pad on his shoulders and back.

Q. Now, did you ever know of his doing any farm work without your knowing what was coming?

A. Well, not in the late years. He used to do a lot of work.

Q. Before he got in that condition, what did he do there on the ranch?

A. Well, he did all kinds of farm work. He drove the tractor, and, well, any kind of work on the farm.

Q. Well, will you describe further to the jury what you know of your own knowledge about his condition and the appearance of pain, and so on?

A. Well, I know that when he goes out and does any kind of work like lifting or trying to get the tractor—drive the tractor, that he has a lot of—that he will soon come to the house and want aspirin or want something done to relieve him of the pain.

Q. And have you ever seen him do any substantial amount of work at all since '35?

A. Well, no, I have not.

Q. And then when—at those times that you say you have observed him when he tried to work, what have you observed, if anything, about his ability to sleep after he had done it.

(Testimony of Stella C. Hughes.)

A. Well, he does not sleep. If he gets out and does any physical labor during the day, he does not sleep and he does not let anyone else sleep. He needs attention to relieve his pain.

Mr. Laney: You may take the witness.

Mr. Hull: No questions.

(The witness was excused.)

Mr. Laney: The plaintiff rests, may it please the Court.

Mr. Hull: Your Honor please, are we going [241] to have a recess at this time?

The Court: Yes, the Court will stand at recess for a few minutes. Keep in mind the Court's admonition.

(A recess was thereupon taken.)

(After recess, in chambers in the absence of the jury, the following proceedings were had:)

Mr. Hull: The defendant moves the Court to instruct the jury to return a verdict for the defendant, on the grounds that the evidence offered in the trial of this case, and I am referring now to the plaintiff's case, and taken in the light most favorable to the plaintiff, is not sufficient to support the affirmative answer to the issue as to whether the plaintiff has became totally and permanently disabled by bodily injury and diseases so that he is and will be permanently and continuously and wholly prevented from performing any work for

compensation, gain or profit, and performing any gainful occupation; that is to say, within the express provisions of the policy of insurance upon which this suit is based.

Mr. Lynn Laney: May it please the Court, the plaintiff respectfully resists the motion and cites as ample authority the case of the Equitable Life Assurance Society of the United States vs. [242] Boyd, by the Supreme Court of Arizona, quoted in 76 Pac. 2d, 752, in which the Supreme Court, in dealing with their claim that the insured had not shown he was permanently and totally disabled within the meaning of that same wording, used the language that: "Such disability means one which prevents the insured from engaging in any occupation or performing any work for compensation of financial value, and it must be total as distinguished from partial disability. Of course, the work must be substantial and not trivial, amount to a job, an occupation, and a disability under this policy does not necessarily imply an incapacity to do any work at all, or that the person must be bedridden, or that he must work where to do so would shorten his life or seriously impair his health; and the fact that he did do some work because forced thereto by absolute necessity when he was really not able to work would not change a total disability to a partial one," and going on and on and on.

Mr. Hull: I read that. I think that supports my theory.

(Argument between Court and counsel, after which a recess was taken.)

(After recess, in open court, and the jury being present, the trial resumed as follows:)

The Court: We will suspend at this time until 10:00 in the morning. Be in your places at 10:00 o'clock in the morning.

(Thereupon a recess was taken.) [244]

10:00 o'Clock A.M., October 15, 1948

All parties as heretofore noted by the Clerk's record being present, except the jury, the following proceedings were had:

Mr. Lynn Laney: May the record show, may it please the Court, that we have argued the matter of the defendant's motion for an instructed verdict in his favor, have argued that in chambers and in the absence of the jury; that the Court has indicated that he will instruct a verdict in favor of the defendant, and in that connection may the record show that the plaintiff desires to except to such ruling, and such proposed ruling, on the ground that the evidence in our view has been sufficient to make the matter of total disability within the terms of the policy a question of fact for the jury, and may the record show that the ruling sought by the defendant—that we do want the record to show that we have made known, and do make known to the Court, that the action of the Court sought by the defendant, we object to respectfully and except to it, and that we ask the Court to submit to the jury the question of total disability within the meaning of the policy as a question of fact, and submit the

issues in [245] general to the jury. That is our position.

The Court: All right. Call the jury.

(Thereupon the jury was called into the courtroom and assumed their respective places in the jury box.)

The Court: The defendant's motion for an instructed verdict is granted. You may prepare a verdict and I will appoint a member of the jury as foreman and ask him to sign it. I will appoint you foreman of the jury and ask you to sign this verdict, please.

(Thereupon Juror Herbert F. Leo signed the verdict.)

Mr. Laney: Now that the Court has granted the defendant's motion for an instructed verdict and in accordance therewith instructed the jury to bring in a verdict in favor of the defendant, the plaintiff respectfully excepts to that ruling of the Court and insists that the issues under the evidence should be submitted to the jury.

(Thereupon the jury was excused.)

Mr. Hull: May it please the Court, the case on trial of Hughes vs. Mutual Life Insurance Company of New York, now that the Court has directed a verdict for the defendant, the defendant now moves for a formal entry of judgment by the Court.

The Court: All right.

(Thereupon the trial was ended at 10:45 o'clock a.m. of the same day.) [247]

**REPORTER'S CERTIFICATE**

I hereby certify that the proceedings had upon the trial of the foregoing cause are contained fully and accurately in the shorthand record made by me thereof, and that the foregoing 247 typewritten pages constitute a full, true and accurate transcript of said shorthand record.

/s/ LOUIS L. BILLAR,  
Official Reporter.

[Endorsed]: Filed Feb. 17, 1949.

---

[Title of District Court and Cause.]

**STIPULATION FOR DIMINUTION  
OF RECORD**

It Is Hereby Stipulated and Agreed by and between the plaintiff and defendant above named, acting by and through their respective attorneys, that it shall not be necessary for the Clerk of the above-entitled court to transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record on appeal, the following named papers, documents and exhibits, to wit:

1. Stipulation filed March 24, 1948, extending time for defendant to plead and answer.
2. Defendant's original answer filed April 15, 1948.
3. Plaintiff's motion to set cause for trial and notice thereof.

4. Stipulation that defendant may file amended answer.
5. Deposition of Thomas J. Hughes.
6. Notice of filing deposition of Thomas J. Hughes.
7. Defendant's praecipe for subpoena filed October 4, 1948.
8. Defendant's praecipe for subpoena filed October 5, 1948.
9. Plaintiff's praecipe for subpoena filed October 9, 1948.
10. Jury list filed October 13, 1948.
11. Defendant's memorandum of costs and disbursements filed October 20, 1948.
12. Defendant's subpoenas filed November 17, 1948.
13. Defendant's exhibit marked "B" for identification, a suitcase containing various documents which with its contents was withdrawn by the plaintiff, upon stipulation of counsel.

Dated: February 18th, 1949.

LANEY & LANEY.

By /s/ GRANT LANEY,  
Attorneys for Plaintiff and Appellant.

EVANS, HULL, KITCHEL,  
JENCKES & ROSS.

By /s/ RICHARD P. MEASAN,  
Attorneys for Defendant and Appellee.

[Endorsed]: Filed Feb. 18, 1949.

[Title of District Court and Cause.]

**ORDER TO SEND UP ORIGINAL  
EXHIBITS**

It appearing to the court that the original exhibits in this cause should be sent to the Appellate Court in lieu of copies;

It Is Hereby Ordered, that the Clerk of this court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, the following original exhibits in this action, to be by him safely kept and returned to this court upon the final determination of this action in said Circuit Court of Appeals, namely:

All of plaintiff's exhibits in evidence and all of defendant's exhibits marked for identification save and except those expressly excluded from the record on appeal by "Stipulation for Diminution of Record" signed by attorneys for plaintiff and defendant and on file herein.

Dated February 18, 1949.

/s/ DAVID W. LING,

United States District Judge.

[Endorsed]: Filed Feb. 18, 1949.

In the United States District Court  
for the District of Arizona

CLERK'S CERTIFICATE

United States of America,  
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Thomas J. Hughes, Plaintiff, versus The Mutual Life Insurance Company of New York, a corporation, numbered Civ-1153 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing documents, to-wit:

1. Transcript of Record on Removal to the United States District Court for the District of Arizona, filed March 20, 1948.
2. Minute entry of Monday, June 14, 1948.
3. Amended Answer of Defendant, filed September 29, 1948.
4. Minute entries of Wednesday, October 13, 1948, Thursday, October 14, 1948, and Friday, October 15, 1948 (proceedings of trial including order for judgment on the verdict).
5. The final judgment, as entered by the clerk in the civil docket on October 15, 1948.
6. The verdict, filed October 15, 1948.
7. Plaintiff's Motion for New Trial, Notice of Hearing, and Memorandum of Points and Authorities, filed October 22, 1948.

8. Minute entry of Monday, November 1, 1948.
9. Minute entry of Wednesday, January 12, 1949 (docketed January 12, 1949).
10. Plaintiff's Notice of Appeal, filed February 8, 1949.
11. Plaintiff's Bond on Appeal, filed February 8, 1949.
12. Plaintiff's Designation of Record and Proceedings to be Contained in Record on Appeal, filed February 17, 1949.
13. Reporter's Transcript, filed February 17, 1949.
14. Stipulation for Diminution of Record, filed February 18, 1949.
15. Order to Send Up Original Exhibits, filed February 18, 1949.
16. Plaintiff's original exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, admitted and filed in evidence October 13, 1948.
17. Defendant's exhibit A, marked for identification October 13, 1948; and Defendant's exhibits B-1 to B-78, inclusive, and C, marked for identification October 14, 1948,  
are the original documents filed in said case and designated in the Designation of Record and Proceedings to be Contained in Record on Appeal as amended by the Stipulation for Diminution of Record, excepting the minute entries aforesaid, and the final judgment as entered by the clerk in the civil docket, and I further certify that the foregoing copies of minute entries of June 14, 1948, October 13, 14 and 15, 1948, November 1, 1948, and

January 12, 1949, and of the final judgment as entered by the clerk in the civil docket, are true and correct copies of the originals thereof remaining in my office.

I further certify that the Clerk's fee for preparing and certifying this record on appeal amounts to the sum of \$2.80 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and the seal of said Court at Phoenix, Arizona, this 7th day of March, 1949.

[Seal]      /s/ WM. H. LOVELESS,  
Clerk.

---

[Endorsed]: No. 12202. United States Court of Appeals for the Ninth Circuit. Thomas J. Hughes, Appellant, vs. The Mutual Life Insurance Company of New York, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Arizona.

Filed March 9, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 12202

THOMAS J. HUGHES,

Appellant,

vs.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a Corporation,

Appellee.

## STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY AND DESIGNATION OF RECORD FOR PRINTING

Thomas J. Hughes, the Appellant in the above-entitled action, pursuant to Subdivision 6 of Rule 19 of the Rules of the above-named court, hereby presents the following statement of the points on which he intends to rely on this appeal:

I. That the trial court erred in granting defendant's motion to direct the jury to return a verdict for the defendant for the reason that the evidence offered by the appellant by means of testimony and exhibits, taken as a whole, was sufficient to require submitting the case to the jury on the question of whether or not the appellant, Thomas J. Hughes, ever since the year 1935 had suffered permanent and total disability from bodily injury or disease, within the meaning of those terms as used in the insurance policy involved in the case at bar.

II. The evidence introduced by the plaintiff in the case at bar, taken as a whole, established that

he was so disabled as to render him unable to perform in a customary and usual manner or at all the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit, and, accordingly, the court erred in granting defendant's motion to direct the jury to return a verdict for the defendant, for the reason that the total and permanent disability contemplated by the total and permanent disability clause contained in the insurance policy in the case at bar does not mean, as its literal construction would require, a state of absolute helplessness, but contemplates rather such a disability as renders the insured unable to perform in a customary and usual manner all the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit.

III. Total disability which prevents an insured from engaging in any occupation or performing any work for compensation, within the meaning of the insurance policy in the case at bar, is such a disability as prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity; and since the evidence introduced by the plaintiff, taken as a whole, showed him to be prevented from working with reasonable continuity in his customary occupation, or in any other occupation in which he might reasonably be expected to engage in view of his station and physical and mental capacity, the court erred in direct-

ing the jury to return a verdict for the defendant.

IV. In a case such as the case at bar in which there was evidence of a capital investment and some management thereof by the insured, the test of the total disability of an insured is whether he would be able to procure and perform such employment in the open market, and is a question of fact for the jury to decide.

Pursuant to the aforesaid rule, the appellant hereby designates for printing the following parts and portions of the record forwarded to this court by the clerk of the United States District Court for the District of Arizona, to wit:

1. Attorneys of record.
2. The entire transcript of record on removal from the Superior Court of Maricopa County, State of Arizona, to the United States District Court for the District of Arizona, consisting of the following:
  - (a) Plaintiff's complaint and the copy of the insurance policy attached thereto as Exhibit "A" (This copy of insurance policy may be either printed or incorporated in the printed record by means of a photostatic copy, whichever is most feasible.)
  - (b) Summons.
  - (c) Notice of application for removal.
  - (d) Petition for removal of suit to the District Court of the United States for the District of Arizona.
  - (e) Removal bond.
  - (f) Order for removal of suit to the District Court of the United States for the District of Arizona.

(g) Minute entry of the Superior Court of Maricopa County, Arizona, ordering removal to the District Court of the United States for the District of Arizona, and fixing bond in the sum of \$500.00

(h) Certificate of Walter S. Wilson, Clerk of the Superior Court of Maricopa County, Arizona, certifying to the correctness of the transcript of record on removal.

3. Amended answer of defendant.  
4. All minute entries, except the minute entry of Monday, June 14, 1948, which is the order setting the case for trial.

5. Verdict of the jury.  
6. The final judgment as entered by the Clerk in the Civil Docket.

7. Plaintiff's motion for new trial. (The memorandum of points and authorities attached to the foregoing motion for new trial are not to be printed.)

8. Plaintiff's notice of appeal.  
9. Plaintiff's bond on appeal.  
10. Designation of record and proceedings to be contained in record on appeal.  
11. The reporter's transcript of evidence in its entirety.

12. Stipulation for diminution of record.  
13. Order to send up original exhibits.  
14. The District Court Clerk's certificate to record on appeal.

15. Plaintiff's exhibits in evidence Nos. 1, 2, 3, 4, 5, 6 and 7.

The appellant does not request or require incor-

poration in the printed record of plaintiff's exhibits Nos. 8, 9 and 10, which are numerous x-ray film in large envelopes, or the cancelled checks contained in plaintiff's exhibit No. 11.

The appellant does not request or require the printing or incorporation in the printed record of any of the defendant's exhibits, all of which were marked for identification only, and none of which were introduced in evidence.

Dated at Phoenix, Arizona, this 8th day of March, 1949.

LANEY & LANEY.  
By GRANT LANEY,  
Attorneys for Appellant.

(Acknowledgment of Service.)

[Endorsed]: Filed March 10, 1949. Paul P. O'Brien, Clerk.

**No. 12202**

# **United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

THOMAS J. HUGHES,

*Appellant,*

VS.

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, a corporation,

*Appellee.*

---

## **APPELLANT'S OPENING BRIEF**

**Upon Appeal from the District Court of the United States  
for the District of Arizona.**

---

LANEY & LANEY,

GRANT LANEY,

LYNN M. LANEY,

610 Luhrs Tower,  
Phoenix, Arizona,

*Attorneys for Appellant.*

**FILED**

MAY 14 1949

JUL P. O'BRIEN,  
CLERK



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**No. 12202**

**United States Court of Appeals**

FOR THE NINTH CIRCUIT

---

THOMAS J. HUGHES,

*Appellant,*

VS.

THE MUTUAL LIFE INSURANCE COMPANY OF  
NEW YORK, a corporation,

*Appellee.*

---

**APPELLANT'S OPENING BRIEF**

**Upon Appeal from the District Court of the United States  
for the District of Arizona.**

---

This is an appeal from a final Judgment of the United States District Court for the District of Arizona in favor of the defendant and against the plaintiff upon a verdict directed by the court and from an order denying the plaintiff's Motion for a new trial.

In this brief the parties will be referred to by their designations in the District Court, viz., appellant as plaintiff, and appellee as defendant. References to the transcript of record will be indicated by page number in parenthesis.

## I.

**JURISDICTIONAL STATEMENT.**

The plaintiff, a resident of Arizona, originally brought this suit in the Superior Court of Maricopa County, Arizona, by filing his complaint therein on January 31, 1948 against the defendant, The Mutual Life Insurance Company of New York, a New York Corporation, doing business in Arizona as a foreign corporation (2-17). The plaintiff, because of his becoming totally and permanently disabled, seeks, by his complaint, to recover from the defendant, the sum of \$6,430.85 (9), exclusive of interest, on account of monthly income or disability benefit payments due the plaintiff under the terms of a certain life and health insurance policy issued him by the defendant (12-16). The plaintiff also seeks to recover the further sum of \$1,368.12 (8), exclusive of interest, on account of annual premiums paid by him under protest. The plaintiff also seeks to recover interest, up to the time of filing his complaint, on said monthly income payments and annual premiums so paid, thereby making the total amount the plaintiff seeks to recover the sum of \$9,142.97 (10).

On February 21, 1948, the defendant, by proper proceedings in said Superior Court, caused said suit to be removed to the United States District Court for the District of Arizona (19-27).

Thereafter defendant filed its answer wherein it admitted the issuance of the policy, that plaintiff had

paid all premiums and that the policy was at all times in force and effect, but denied that the plaintiff had ever become totally and permanently disabled and denied that the defendant was indebted to the plaintiff in any sum whatsoever (27-30).

The jurisdiction of said District Court over the parties and the subject matter was invoked under Paragraph (1), Section 41, Title 28, United States Code, as it then existed, because: (a) the suit is between citizens of different states, the plaintiff being a citizen and resident of the State of Arizona and the defendant being a citizen and resident of the State of New York (20-21), duly qualified and authorized to do business in the State of Arizona as a foreign corporation; and (b) the value of the matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

Jurisdiction is conferred upon this court to entertain and decide the case upon this appeal by Sections 1291 and 1294, Title 28 (new) United States Code, in that a verdict of the jury, directed by the court, for the defendant was returned on October 15, 1948, and on said date a final judgment in favor of defendant was entered on said verdict (34, 35). On October 22, 1948, plaintiff filed his Motion for New Trial (36), which, after having been taken under advisement on November 1, 1948 (38), was denied on January 12, 1949 (38). On February 8, 1949, plaintiff filed Notice of Appeal (39) and Cost Bond (39-41) and on February 17, 1949, filed his Designation of Record and

Proceedings to be Contained in Record on Appeal, together with the Reporter's Transcript of the Evidence (41-42).

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## II.

### STATEMENT OF THE CASE.

On July 7, 1925, the plaintiff obtained from the defendant a life and disability insurance policy (12, 44), effective as of June 30, 1923 (14). The parts of certain provisions of the policy which are involved in and material to the consideration of this case are:

#### “BENEFITS IN THE EVENT OF TOTAL AND PERMANENT DISABILITY BEFORE AGE 60.

“WHEN SUCH BENEFITS TAKE EFFECT.—If the Insured, after payment of premiums for at least one full year, shall, before attaining the age of sixty years and provided all past due premiums have been duly paid and this policy is in full force and effect, furnish due proof to the company at its home office . . . that he has become totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation, . . . , the company, upon receipt and approval of such proof, will grant the following benefits: (13)

“1. WAIVER OF PREMIUM.—The company will, during the continuance of such disability,

waive payment of each premium as it becomes due, commencing with the first premium due after approval of said due proof. Any premium due prior to such approval by the company must be paid in accordance with the terms of the policy, but if due after receipt of said due proof, will, if paid, be refunded upon approval of such proof (14).

“2. INCOME TO INSURED.—The company will, during the continuance of such disability, pay to the insured a monthly income at the rate of Ten Dollars for each one thousand dollars of the face amount of this policy . . . , the first such monthly payments being due on receipt of said due proof and subsequent payments on the first day of each calendar month thereafter, if the insured be then living and such disability still continue. No income payments, however, will be made prior to approval of such proof by the company as satisfactory, but upon such approval, whatever income payments shall have become due will then be paid and subsequent payments will be made when due. . . . (14)

“PROOF OF CONTINUANCE OF DISABILITY REQUIRED; RECOVERY FROM DISABILITY.—Although the proof of total and permanent disability may have been accepted by the company as satisfactory, the insured shall at any time thereafter, and from time to time, but not oftener than once a year, on demand, furnish to the company due proof of the continuance of such disability, and if the insured shall fail to furnish such proof, or if it shall appear to the

company . . . that the insured is able to perform any work or follow any occupation whatever for compensation, gain or profit, no further premium shall be waived and no further income shall be paid (14).

#### “AMENDMENT PROVIDING ADDITIONAL BENEFITS IN THE EVENT OF TOTAL AND PERMANENT DIS- ABILITY

The clause in this policy entitled “*Benefits in the Event of Total and Permanent Disability before Age 60*” is hereby amended by the addition of the provisions set forth hereunder and in no other respects:

I. Increased Income after 5 and 10 Years Continuous Disability.—If the Insured become entitled to the Disability Benefits specified in said clause, the monthly income per \$1000 of the face amount of the policy shall, if the disability be continuous, be increased from \$10, (a) to \$15 after income payments have been made for five full years (that is for sixty consecutive months), and (b) to \$20.00 after income payments have been made for a further five full years (that is for sixty consecutive months), at which amount it shall remain during further continuous total disability. Such disability shall not be considered continuous for the purpose of this provision if the Insured so far recovers as to be able temporarily or permanently to perform any work or enter any occupation whatever for compensation, gain or profit. If the Insured shall so recover and shall subsequently become totally and permanently

disabled, the monthly income payments during such subsequent disability shall commence at \$10 per \$1,000 of the face amount of this policy and shall each be of the same amount as if no such prior disability had existed (15).

II. Disability Presumed Permanent after 90 Days Continuous Disability.—If the Insured shall be totally disabled as defined in this policy for a continuous period of not less than ninety days, such disability shall, during its further continuance, be presumed to be permanent, but the Company shall have the right, anything in this policy to the contrary notwithstanding, to require proof of the continuance of such disability, during the first two years of such disability, at any time at which either a premium falls due or an income payment becomes payable, and after said two years, from time to time, but not oftener than once a year, as provided for in said clause in this policy." (15)

The plaintiff, Thomas J. Hughes, by occupation a farmer (111), ever since the year 1917 has owned a 412 acre farm and a dairy (122-124) which he farmed, managed and supervised, and where he did all kinds of farm work and labor himself until he became totally and permanently disabled in the year 1935, due to injuries and arthritis (44-45, 82-101). Ever since the year 1935 the plaintiff's disability and illness has increased and become progressively worse and he has been unable to manage or supervise his farm or do any work or perform any other acts except a few of a trivial nature (102-109, 82-101, 213-238). The

plaintiff's farm, as a capital investment, earns him an income. The plaintiff since becoming disabled has had to hire a foreman to supervise and manage his farm and dairy and others to do the farm and dairy work (106-138, 201-208).

Upon becoming disabled in 1935 the plaintiff made claim to the defendant for the payment to him of the monthly disability or income payments and waiver of payment of premiums under the above quoted provisions of his policy (45). After having submitted proof of his disability and having been examined by company doctors, the defendant accepted the proof, approved plaintiff's claim, and each month from July, 1935 to January, 1942, paid the plaintiff the monthly income payments and waived payment of the annual premiums each year until the premium which, but for the plaintiff's disability, would have been due on June 30, 1942 (46-52). Ever since January of 1942 the defendant has refused to pay any further monthly income, has refused to waive any further premiums, and has demanded payment thereof under threat of cancelling the policy. The plaintiff, not desiring to run the risk of losing his policy, paid under protest the annual premiums thereon for the years 1942 to 1947 inclusive (63-66, 101-102).

On January 31, 1948, the plaintiff brought this suit for the purpose of recovering from the defendant the aforesaid premiums so paid under protest, which amount to the sum of \$1,368.12, and for the purpose

of recovering from the defendant the monthly income payments due him from January, 1942 to January, 1948, which amount to the sum of \$6,430.85. The plaintiff also seeks to recover interest on the premiums so paid amounting to \$253.08, and interest on said monthly income payments amounting to \$1,090.92 at time of filing the complaint (2-17).

After removing the case to the District Court the defendant filed its answer wherein it admitted the issuance of the policy, that plaintiff had paid all premiums and that the policy was at all times in force and effect, but denied that the plaintiff had ever become totally and permanently disabled or entitled to waiver of premiums or to monthly income payments, and denied that the defendant was indebted to the plaintiff in any sum whatsoever (27-30).

A three day trial of this matter was had with a jury, commencing on October 13, 1948 (30, 31). At the close of plaintiff's case, defendant, without offering any evidence, moved the Court to instruct the jury to return a verdict for the defendant, upon the ground that the plaintiff's proof failed to establish that he had become totally and permanently disabled within the express provisions of the policy (238, 239).

After argument and due exception the court granted this motion (240-241), caused the jury to return a verdict for the defendant, and thereupon, on October 15, 1948, ordered entry of judgment for defendant. Whereupon such judgment was entered (34, 35, 241).

Plaintiff filed his motion for new trial on October 22, 1948 (36-37), which was taken under advisement on November 1, 1948, and denied on January 12, 1949 (38). Thereafter this appeal was taken and perfected (39-42).

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### III.

#### **FACT IN DISPUTE AT TRIAL AND ISSUE RAISED AND TO BE DECIDED UPON THIS APPEAL**

The only fact in dispute at the trial of this case was whether or not the plaintiff, during the period in question, was totally and permanently disabled within the meaning of the total and permanent disability clause of the insurance policy, so as to be entitled to the income payments and waiver of premiums. The only issue raised and to be decided upon this appeal is whether or not there was sufficient evidence at the close of plaintiff's case, to require submission to the jury of the question whether the plaintiff had suffered permanent and total disability from bodily injury or disease within the meaning of those terms as used in the insurance policy in question, and whether the trial court erred in holding that there was not sufficient evidence to require such submission to the jury.

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### IV.

#### **SPECIFICATION OF ERROR.**

The trial court erred in granting the defendant's motion to instruct the jury to return a verdict for the

defendant, and in denying the plaintiff's motion for a new trial, for the following reasons:

(a) That the evidence introduced by the plaintiff, taken as a whole, was sufficient to require submitting the case to the jury on the question of whether or not the plaintiff, Thomas J. Hughes, ever since the year 1935, had suffered permanent and total disability from bodily injury or disease, within the meaning of those terms as used in the insurance policy involved in the case at bar.

(b) That the evidence introduced by the plaintiff, taken as a whole, established that he was so disabled as to render him unable to perform, in a customary and usual manner, or at all, the substantial and material acts of his occupation or any other work for compensation, gain or profit, and, therefore, the issue of whether or not the plaintiff had become so totally and permanently disabled as to entitle him to the monthly benefit payments and waiver of premiums as provided under the terms of the insurance policy in question should have been submitted to the jury, in that the total and permanent disability contemplated by the total and permanent disability clause contained in said insurance policy does not mean, as its literal construction might be claimed to require, a state of absolute helplessness, but contemplates, rather, such a disability as renders the insured unable to perform in a customary and usual manner the substantial and material acts necessary to perform his occupation or any other work for compensation, gain or profit.

(c) That the evidence introduced by the plaintiff, taken as a whole, showed him to be prevented from working with reasonable continuity in his customary occupation, or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity, and, therefore, the issue of whether or not the plaintiff had become so totally and permanently disabled as to entitle him to the monthly income and waiver of premiums as provided in the insurance policy in question should have been submitted to the jury, in that the total disability which prevents an insured from engaging in any occupation or performing any work for compensation, gain or profit, within the meaning of said insurance policy, is such a disability as prevents his working with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity.

(d) In a case such as the case at bar, in which there was evidence of a capital investment and some management thereof by the insured, the test of the total disability of the insured is whether he would be able to procure employment in the open market in the same capacity in which he is managing his investments, and, under the evidence, was a question of fact for the jury to decide.

(e) That when the evidence shows an insured to be disabled, then the issue of whether or not the in-

sured is totally and permanently disabled from engaging in an occupation or doing any work for remuneration or profit, as those words are used in an insurance policy, becomes a question of fact for the jury to decide.

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## V.

**ARGUMENT.****1. Preliminary Statement as to the Law and the Evidence.**

It is the plaintiff's contention in this case that the evidence at the close of the plaintiff's case established that he suffered such a disability that he was unable to perform in a customary and usual manner, or at all, the substantial and material acts of his occupation, or any other occupation, for compensation, gain or profit, and was unable to work with reasonable continuity in his customary occupation or in any other occupation which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity. That under the law, an insured suffering a disability such as the plaintiff's, is totally and permanently disabled within the meaning of a disability clause of a policy providing for benefits in the event the insured shall become totally and permanently disabled from performing any work or following any occupation for compensation, gain or profit, and accordingly the trial court erred in holding otherwise by instructing a verdict for the defendant and in denying the plaintiff's motion for a new trial.

The words in an insurance policy that the insured "has become totally and permanently disabled by bodily injury or disease so that he is and will be permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit and from following any gainful occupation" should have a liberal construction, as a literal construction would require a complete loss of physical power and mental capacity and it would scarcely happen that one could live and bring himself within the literal language of the policy. He would have to be absolutely helpless physically, and insane or in a coma. To hold otherwise would be to establish that this type of insurance is nothing more than a cheat, pretense and a fraud, as was said in:

*Equitable Life Assur. Soc. v. Serio*, 155 Miss. 515, 124 So. 485.

That such liberal construction should apply is well established as will be seen from the cases hereinafter cited in this brief.

A proper determination of this case depends largely upon the evidence at the close of plaintiff's case. Accordingly, we deem it necessary to review the evidence at considerable length and in detail. In the case at bar we are dealing with a disabled farmer and believe it will be helpful in understanding the significance of the evidence if we comment on a case of a farmer suffering disability before reviewing the evidence.

In *Erreca v. Western States Life Ins. Co.*, 19 Cal. (2d) 388, 121 P. (2d) 689, the insured was a ranch executive. He made annual arrangements for crop financing, signed notes and mortgages, bought live-stock and supplies. He customarily had determined the time for planting, harvesting and selling his crops, he acted as ranch superintendent, managed and supervised the farm work, did manual labor, operated ploughs and tractors, and repaired fences, buildings and farm machinery. Since becoming disabled, he can take short walks. He can perform no manual labor or inspect his lands. He can drive an automobile and negotiate loans and leases, sign notes and mortgages, talk with grain buyers, participate in buying supplies, and occasionally talks with his son concerning farm operations. The California Supreme Court held that although such acts are neither trivial nor inconsequential, they are duties that are infrequently and intermittently performed and cannot be said to constitute the substantial and material acts of the occupation of farming. The Court held that the insured was totally and permanently disabled within the meaning of those terms as used in his policy. The court further said that the magnitude of the insured's enterprise and his income therefrom were not to be considered in determining whether or not the insured was totally disabled from performing remunerative work within the meaning of the policy.

This case gives a review of the law as established in a number of the states. The fifth and tenth headnotes of the case read:

"The term 'total disability' in a policy providing for disability benefits does not signify an absolute state of helplessness but means such a disability as renders insured unable to perform substantial and material acts necessary to prosecution of a business or occupation in customary way, and recovery is not precluded because insured is able to perform sporadic tasks or give attention to simple or inconsequential details incident to conduct of business.

The question of what amounts to total disability within an insurance policy providing for benefits in case of total and permanent disability is a 'question of fact'."

## **2. Review of the Evidence.**

The evidence in the case at bar is as follows:

That in 1932 the plaintiff, Thomas J. Hughes, was kicked by a mule, which resulted in several broken vertebrae for Mr. Hughes (44). This caused him to be confined to his bed about eight months (45). In 1935 he fell and broke his back, whereupon he made claim to the defendant for the monthly benefits and waiver of premiums under the disability provisions of his policy (45). The defendant approved the claim, notified plaintiff of this fact by letter of October 7, 1935, introduced in evidence as Plaintiff's Exhibit 1. (46-47). Prior to allowance of the claim plaintiff was examined by defendant's doctors, and thereafter from

time to time defendant requested and obtained further medical examinations. The plaintiff complied with every request for medical examinations and proof of his condition (47-50). After approval of plaintiff's claim, defendant waived payment of premiums each year up to and including the year 1941, and each month commencing with July, 1935, paid the monthly income up to and including the one falling due January 1, 1942 (50).

After income payments were started in 1935, plaintiff had gotten worse (50). In May, 1942, defendant by letter, in evidence as plaintiff's Exhibit 4, notified plaintiff that the proofs submitted were not sufficient to show him to be totally and permanently disabled, and advised that the company would not approve further benefits and that he must pay future premiums (51-52). This letter offered to give consideration to additional proof. Plaintiff, by letter dated June 1, 1942, offered to submit further proof and requested defendant to advise what further proof was desired (53-57). This letter is in evidence as Plaintiff's Exhibit 5 (55). Plaintiff submitted further proofs that defendant requested (58-59). Between January 1, 1942, and June 1, 1942, plaintiff furnished further proof and at request of defendant was examined by two of the company's doctors in Phoenix, Arizona, and another from Tucson, Arizona (59-62). The Tucson doctor stated to Mr. Hughes that he didn't see how plaintiff "could walk without braces on account of the arthritis was bad in the hip." (62).

After defendant had ceased paying benefits and had demanded payment of premiums and on June 27, 1942, plaintiff paid under protest the annual premium of \$228.02, which but for plaintiff's disability would have been due on June 30, 1942 (63-64). The protest and grounds therefor are contained in a letter accompanying payment. This letter is in evidence as Plaintiff's Exhibit 7 (65-66). Plaintiff paid all further premiums under protest (101). Defendant admitted payment under protest in open court (65) and in its answer (29). The premiums so paid were for years 1942 to 1947 inclusive (101).

Since 1935 plaintiff's health has gotten worse and he has not been able to do any work whatever, has not been able to drive a tractor, and when he tried to drive one it was so painful and so adversely affected him that he could not do it, had to go to bed and even lie down in the field. He had to have hot pads applied, had to take medicine and could not sleep at night (102-104). Before plaintiff became disabled in 1935 he ran a ranch, baled hay, ran a harvesting and threshing machine, irrigated, did ploughing, and all kinds of ranch work. Since 1935 he has been unable to do any work. He is able to drive a pickup truck sometimes, and sometimes is able to drive his car to church on Sundays, but very little. Plaintiff's arm is so bad he has nearly lost the use of it (104). Both his arms, both hips, his back, his feet and his ankles, ever since 1935 have been "in a pretty bad fix." He cannot use his left arm at all. He is able to write some but it

gives him pain and he cannot sit still for any length of time due to the pain and stiffness he suffers. He suffers great pain when he walks. Whenever plaintiff attempts to work it gives him pain, he has to take medicine, lie down or go to bed (105-106).

Ever since plaintiff was injured he has been unable to run or supervise his farm and has had to employ a manager to run and supervise it (106). Ever since a time prior to getting hurt, plaintiff has been a member of the council of a Water User's Association, which regularly meets four times a year and sometimes has a special meeting. He cannot drive his automobile to attend these meetings, but has to depend on someone else to bring him. He is on a rural school board. Most of the meetings of the board are held at his home because of his inability to attend them at the school (107). Before being disabled plaintiff did all kinds of work that a farmer would do, repaired machinery and milked cows. Since becoming ill he has been unable to walk out in his fields or direct hired hands, and has been unable to do any milking. All this work he has had to hire done (108).

Cross-examination of the plaintiff brought out the following further facts: plaintiff in 1935 was farmer by occupation, did everything on the farm, and had followed that occupation most of his life. He had gone to a teacher's college or normal school three or four years, but had not gotten a teacher's certificate or ever taught school. He has been on a rural school board

since prior to 1935, attending meetings when he could, but could not attend all. He passed on the school budget as a member of the board (109-113). He owns 412 acres of irrigated land, where he has lived since 1917, has a dairy, and various farm crops are raised (122-124). Plaintiff milked cows before he got hurt (127). He had no foreman before he got arthritis (130). The foreman looks after whole ranch and everything (133). A part of the land he leased out (124). In July, 1948, plaintiff rode in an automobile to Santa Ana, California, but came back in about a week because his arthritis was hurting him so much he could not stay (131-132). He talked to his foreman about changing crops (133). Plaintiff purchased ten acres of land in 1940, and another forty acres in 1942. He executed a note for \$2,000.00 and a mortgage (137-138). Plaintiff entered into various leases whereby he leased to others 185 acres of his farm (138-142). Plaintiff called a man and arranged to have him plough forty acres of land belonging to his sister, have it planted to grain, harvested and taken to mill (143-144). Plaintiff is better off financially now than before he got arthritis (145). He sells milk from his dairy to the Borden Company (145) and receives about \$800.00 or \$900.00 a month for it. He sells more milk now than in 1941 and for a better price (146). He was seventy-two years old at the time of trial on October 14, 1948 (155). Counsel for defendant had marked for identification plaintiff's account book and certain statements of the Borden Creamery (156-157). They were not offered or received in evidence. Plain-

tiff made bank deposits (159-160). Defendant's counsel then had marked for identification some deposit slips a few other papers and a large number of cancelled checks written by plaintiff in payment of bills, expenses, hired help and other items. None of these checks or other papers were offered or admitted in evidence. Defendant's counsel examined him at length concerning the checks. Plaintiff admitted writing them (160-184). The cross-examination further disclosed that plaintiff had borrowed money from time to time (181-183), and had acted as administrator of an estate (184, 185) because the decedent owned a mortgage on forty acres that he wished to pay and he could get no one else to act (190). Plaintiff went with son in automobile to Flagstaff, Arizona and Grand Canyon (191). Plaintiff got \$4.10 a day for each meeting of the council of the Water Users' Association which he previously testified met four times a year (192). In 1942 he made a trip to Washington, D. C. for the Water Users Association (194), but his arthritis got so bad he had to stop in Kansas City where he was very sick and confined to bed (195). Plaintiff suffers a great deal of pain in his joints, arms, legs, knees and hips (196).

On re-direct examination it was further brought out that plaintiff before he became disabled prepared his own land, did his own baling, ran a thresher, did his own renovating and ploughing, and cut his own hay, but that he had to hire all this done after he became disabled (201-202). Plaintiff's joints give him

an awful lot of pain and are stiff (202). He received no compensation for being on the school board (202). He did not drive car on trip to Flagstaff and Grand Canyon (203-204). He can still write checks (204). Since becoming disabled he cannot go out in the fields to determine when his alfalfa should be cut (204-205); that it is necessary to get out around the ranch to properly supervise it, but since becoming disabled he can not do this. It has to be done by his foreman. He had no foreman before he got crippled (205). On his trip to Washington he did not take his cane, but had to get one because he could not get along without it, and he suffered more pain (205-206). When he tries to work he suffers so much pain in his spine that it makes him sick at the stomach and he has to lie down, and if he tries to move about in the fields he suffers pain all over his knees, ankles and joints (206). He is making more money than in 1940 or 1941 because of increased prices (207). The normal school attended by plaintiff combined high school and normal school subjects (207). When he acted as administrator of an estate for a time, the attorneys did all the work (208).

Roy Painter, a neighbor and witness for plaintiff, testified in part as follows: That in 1935 plaintiff was getting awfully stiff. He has seen him frequently since then, and has been to his place many times. (213). That he is on the school board with plaintiff, board meetings of which are often held at plaintiff's home because he is unable to attend elsewhere on account of

his arthritis and crippled-up condition (213). Since 1935 has seen plaintiff try to drive tractor only once, but not for very long as it made him sick and he complained of pain (214). That plaintiff is very stiff, and since 1935 Painter has seen him do work but very few times. When plaintiff attempted the one time to drive tractor to scrape borders, he had to quit, go to the house and lie down. That almost everytime he went to plaintiff's place plaintiff was lying or sitting down. He does not walk out over his farm (215). Before plaintiff got in his bad condition he did all his own work, baling hay, threshing, plowing and disking, but since plaintiff became crippled up he has had to have all his work done by others, called "custom contracting" (216).

Plaintiff's witness H. A. Evans (220) testified in part: That he has known plaintiff for thirteen years; has seen and been to plaintiff's place many times; that upon coming to plaintiff's place plaintiff would either be in a chair or lying down; that when he got up it was an effort for him to move around; that he has driven plaintiff to Phoenix five or six times because he could not use his arm; that he has never seen plaintiff drive a tractor; that he has seen him in a pickup looking at his place; has never seen plaintiff walking in his fields; has seen him walk on the lawn near the house; that plaintiff always uses a cane to help him in walking (220-222).

George L. Freestone (223), plaintiff's witness, testified in part: That he has known plaintiff for about

fifteen years; that several times he took plaintiff to council meetings of Water Users' Association because plaintiff was unable to handle his automobile; that plaintiff was very much handicapped in getting around (222-223); that it was hard for plaintiff to get in and out of automobile and he sometimes had to have help; that plaintiff was not always able to go to council meetings; that it was very hard for plaintiff to walk and that ever since he had known him plaintiff had used a cane; that he never saw plaintiff do any work; that plaintiff went on inspection trips for Water Users' Council; that plaintiff performed his duties as chairman of Water Users' Council whenever there, and was capable of taking care of business of the Water Users' Association (223-227).

Louise Lind (227), connected with the rural school, testified that plaintiff had been on the rural school board for thirteen years; since 1935 plaintiff has become increasingly lame, always walked with a cane; it was very hard for him to get around and walk; that plaintiff often came to board meetings when he should not, although school is only a mile from his place; that she would go to plaintiff's house for him to sign papers when he could not come; that plaintiff was consulted on questions relating to welfare of school and is capable of handling such affairs, but there isn't a great deal of handling (227-229).

Plaintiff's witness Charles Saylor (230), who does custom baling, testified in part: That prior to 1934 or 1935, plaintiff did not use cane, but after that time

used one. Before then plaintiff drove a tractor, plowed, baled his own hay and threshed his own grain. Since 1934 or 1935 plaintiff was working less and hiring more done. Since the middle of the 1930's he has never seen plaintiff do any work; that plaintiff needs a cane to get around and seems stiff and crippled. In coming to plaintiff's place he was always in the house. Has seen plaintiff lying down; has not seen plaintiff in the field over three or four times; has not seen plaintiff drive a tractor or do any other work; that when plaintiff was in the field he had to get back to the house and lie down (230-232). That while baling hay for other farmers they would come out in the field to supervise and inspect the hay, but the plaintiff would not (235).

Stella C. Hughes (236), wife of plaintiff, testified in substance that about 1935 plaintiff began getting stiff and complained of pain in his shoulders and back. Since that time he has gotten worse; she has seen plaintiff try to show a new man how to drive a tractor, but when he did so he came to the house in terrible pain and had to take aspirin and put an electric pad on his shoulders and back. Before plaintiff became ill he drove a tractor and did all kinds of farm work. That when plaintiff does any kind of work he soon comes to the house to obtain relief from pain. That he has not done any substantial amount of work at all since 1935. When plaintiff tries to work he is unable to sleep and he needs attention to relieve his pain (236-238).

Dr. H. L. Goss, a physician and surgeon specializing in X-ray work (67), who had never treated plaintiff, in 1938 made a number of X-ray pictures of various joints, bones and parts of body of plaintiff. These X-rays are in evidence as plaintiff's Exhibit 8. In September 30, 1948, he made another set of X-rays of the various bones, joints and parts of body of plaintiff. This set is in evidence as plaintiff's Exhibit 9. This doctor testified that the X-rays showed plaintiff to be suffering from a calcification of various joints and bones and a great amount of arthritis in his spine, joints and bones, to the extent in some joints of attachment or ankylosis; a great amount of arthritic changes in the bones, arthritic hooks, horns and buds. He testified that the X-rays of 1948 showed that since those taken in 1938 the plaintiff's arthritis had increased in extent and had continued to get worse from 1938 to 1948 (67-82).

Dr. J. H. Patterson (82), a physician and surgeon, testified in part: That plaintiff had been his patient since 1935 (83). He identified a set of X-rays, in evidence as plaintiff's Exhibit 10, taken in 1935 at his direction (83-84); that plaintiff was afflicted with arthritis in 1935 and in testifying from this X-ray film pointed out parts of the body and joints of plaintiff which were suffering from arthritis, arthritic budding and lipping (84-85); that he had been treating the plaintiff since 1935 and endeavoring to help him; that he had made studies of the X-rays taken by Dr. Goss in 1938 (Exhibit 8); that the plaintiff

was suffering from chronic multiple hypotrophic arthritis and his condition had gotten worse (85-86); that he had given plaintiff all kinds of treatment to try to alleviate the pain and suffering he has but that he was unable to do much for it; that the plaintiff has gotten progressively worse; that there had been an increase in deposits of calcium in nearly all of the plaintiff's joints, and through exercising, even though it is painful, he is able to keep motion in his joints but that the plaintiff cannot use them very much at a time because the joints give him too much pain and aggravate the condition (86); endeavoring to do any work or exercise makes the plaintiff feel worse and he has to go to bed at times; on account of the arthritis it would be hard for plaintiff to try to sit at a desk and write, because if he tries to use his joints it makes it just that much worse (87); from 1935 to the present time, in spite of treatments, plaintiff has gotten progressively worse; if he tries to walk about his ranch to any extent it aggravates his condition; that the plaintiff's condition is not normal for a man of his age (87). The doctor in his testimony compared the X-rays of 1935 with those of 1938 and 1948 and pointed out from them the fact that the plaintiff's arthritic condition had gotten much worse, his vertebrae grown together, and that the arthritis and bone changes had grown worse in many of plaintiff's bones and joints; that the plaintiff had lost a lot of calcium in his bones because of disuse; that such bones had gotten thin because of disuse; that the plaintiff's arthritis had gotten progressively worse; that there

are times when under treatment he was able to relieve the plaintiff of his pain but it was only temporary while being treated (87-91); that if the plaintiff endeavored to do any work it would irritate the condition present, would bring on more inflammation and cause more pain (93); that it would be harmful for the plaintiff to engage in any physical activity; would give him more pain and aggravate all his joints and make him so sore that he would have to go to bed; that the plaintiff would not be able to walk very far without having a good deal of pain and aggravation of his symptoms and that this has been his condition ever since 1935; that the excessive deposits of calcium and over-growth of bone structure in the joints of the plaintiff makes it very painful for him to try to move, as the bones have a rough surface; that the rough surfaces make it hard to use the joints; that the plaintiff will continue to get worse until absolutely helpless in bed (94-95); that the plaintiff is permanently and completely disabled; is totally disabled from doing any work; that the plaintiff can walk around but it gives him pain if he walks around too much, he can't stay at it too long, yet he is not completely helpless so far as lifting his hands and arms, feeding himself and clothing himself, but actual work of any kind cannot be done by the plaintiff (95-96).

Upon cross-examination, the following question was asked the doctor and the following answer given by him (97) :

Q. "If it should develop in the evidence in this case that Mr. Hughes does walk around his ranch and does drive a tractor and does do other substantial farm duties, then your opinion would not be worth much weight, would it doctor?"

A. "Yes, I think it would be worth just as much as it was. I would say he has got a lot more guts and is a bigger fool than I thought he was." (97)

The doctor further testified that it was good for an arthritic patient to take exercise if it cleared up his joints but when it makes them sore it is very harmful; that he had tried exercise on the plaintiff but that he had to limit it and that such limitation is the reason why the plaintiff is able to get about as well as he does (97); that he told the plaintiff not to come to his office any more than he had to because he was running up big bills and the treatments were not doing him any good, but that he came in when he had so much pain to get diathermy treatments; that the experience of the doctor in the plaintiff's type of case is that exercise causes pain (98); that the atrophied condition of the plaintiff's bones shown in some of the X-rays was because the plaintiff was unable to exercise because of the pain and harm that such exercise caused him; that the plaintiff had pain because of

irritation from movement; that movement caused him irritation (99). The doctor further testified that in treating the plaintiff, he had given him all kinds of arthritic shots, arsenic shots, gold shots, relief for pain and diathermy, but he kept getting worse (100).

We submit that the foregoing evidence establishes that the plaintiff is and during the period in question was unable to perform the substantial and material acts of any occupation in the usual and customary manner, or at all; that he is unable to work in any occupation with reasonable continuity; that to work or attempt to work would be injurious to his health and entail pain and suffering which persons of ordinary fortitude would be unwilling to endure.

**3. Telling a person to prepare and plant another's land, acting as administrator of an estate and performing other tasks of a trivial or sporadic nature does not negative total and permanent disability as those words are used in disability provision of insurance policy.**

It was brought out on cross-examination that the plaintiff "called" someone and directed him to prepare and plant the forty acre farm of his sister to grain; that he acted as administrator of an estate, signed notes and a mortgage and made deposits in a bank. These activities do not negative total and permanent disability, when an insured is unable to perform the substantial and material acts of an occupation in the customary way.

*Mutual Life Insurance Co. of New York v. Dowdle* (Ark.), 189 Ark. 296, 71 S.W. (2d) 691, is a case

against this same defendant interpreting the identical disability clause involved herein. The business of the insured was that of farm manager and as such he had charge of a farm owned by himself, another by his wife, and a third by the Dowdle Estate in which he was interested as executor. For his management of this last named farm he had been paid \$600.00 a year for the past several years. He had complete control of these places, paid the taxes thereon, prepared the chattel mortgages which the tenants executed, and made all other contracts relating to the management of the farms. These facts being undisputed, the defendant company insisted that the trial court should have declared as a matter of law that the insured was not totally disabled.

Before becoming disabled, the insured gave these farms a most active and efficient management, but since that time he had become less active so that his management was much less efficient. After becoming disabled, the insured's illness caused such pain and suffering that he was frequently unable to sleep at night and it caused him to spend much time lying down during the day. He admitted that he went to the bank and other places in the discharge of his duties, and drove his car without injury to himself.

Upon appeal from a judgment on the verdict in favor of the insured, the Supreme Court of Arkansas affirmed the judgment of the lower court upon the well established theory that the insured was totally and

permanently disabled, within the meaning of those terms as used in this policy, when infirmity rendered him unable to perform all substantial and material acts of his business, or the execution of those acts in the usual and customary way, or if performance of those acts would imperil his health or entail pain and suffering which persons of ordinary fortitude would be unwilling to endure.

The third and sixth headnotes to this case read:

“3. To recover under disability clause of policy, insured need not be absolutely helpless, but is ‘totally disabled’ when infirmity renders him unable to perform all substantial and material acts of his business, or execution of those acts in usual and customary way.

“6. As regards question whether insured was totally and permanently disabled under policy, law does not require one to perform duties at peril of life or health, or if performance entails pain and suffering which persons of ordinary fortitude would be unwilling to endure.”

4. **Farmers held to be totally and permanently disabled, when unable to perform substantial and material acts of an occupation, though able to perform some duties, light work or tasks of a sporadic nature.**

There are many cases holding farmers to be totally and permanently disabled within the meaning of the provisions of the disability clause of an insurance policy where they have been disabled to such a degree that they are unable to perform the material and substantial acts of an occupation, or unable to perform

such acts in usual and customary way, although they can perform some duties and transact some business pertaining to their occupation. In many of these cases the farmer in question could and did do more work than the evidence in the case at bar shows that the plaintiff was able to do. The citations to some of these cases are as follows:

*Atlantic Life Ins. Co. v. Worley*, 161 Va. 951, 172 S.E. 168.

*Hoover v. Mutual Trust Life Ins. Co.*, (a leading Iowa case), 225 Iowa 1034, 282 N.W. 781.

*Jefferson Standard Life Ins. Co. v. Curfman* (Texas), 127 S.W. (2d) 567.

*Manuel v. Metropolitan Life Ins. Co.* (La.), 139 So. 548.

*Katz v. Union Cent. Life Ins. Co.* (Mo.), 226 Mo. App. 618, 44 S.W. (2d) 250.

*Colovos v. Home Life Ins. Co. of New York*, 83 Utah 401, 28 P. (2d) 607.

*Maresh v. Peoria Life Ins. Co.*, 133 Kan. 191, 299 P. 934.

*New England Mut. Life Ins. Co. v. Huckins*, 127 Fla. 540, 173 So. 696.

*National Life & Accident Ins. Co. v. Bradley*, 245 Ky. 311, 53 S.W. (2d) 701.

*Guardian Life Ins. Co. v. McMurray*, 105 Colo. 11, 94 P. (2d) 1086.

*John v. Aetna Life Ins. Co. (Mo.), 100 S.W.  
(2d) 936.*

*Foglesong v. Modern Brotherhood, 121 Mo. App.  
548, 97 S.W. 240.*

**5. Disabled farmer's ability to successfully carry on farming operations through foreman or "proxy" does not negative total and permanent disability.**

The evidence in this case shows that the plaintiff, Thomas J. Hughes, though not driving, took two automobile trips and also a train trip, and was able to carry on farming operations by hiring a foreman to supervise and direct the work. The evidence also showed the farm, so being operated, to earn a substantial income.

In *John Hancock Mut. Ins. Co. v. Magers*, 199 Ark. 104, 132 S.W. (2d) 841, a farmer suffering a disability, took automobile trips and attended to his farming interests very successfully with the help of a foreman. The court in holding this farmer to be totally and permanently disabled within the meaning of his policy, said:

"The insurance contract is not discharged because he may be able to hire a substitute or proxy".

This case also holds that the fact that the insured's farm makes substantial earnings while being operated with the aid of a foreman does not preclude recovery.

6. Ability of disabled farmer and dairyman to keep account of his operations, go to bank, ride in automobile, write checks to pay help and act on school board does not preclude recovery under disability clause of policy, if unable to perform substantial acts of his calling.

The evidence in the case at bar discloses that the plaintiff, Thomas J. Hughes, was able to keep an account of his farm and dairy operations, go to the bank, ride in an automobile, write checks to pay the help, and was a member of a school board. A similar state of facts was passed upon in a New Jersey case against this same defendant, brought to enforce payment of benefits under a policy containing the identical disability provision of the policy involved in the case at bar. The insured was held to be totally and permanently disabled within the meaning of the disability clause of the policy. This case is:

*Raub v. Mutual Life Insurance Co. of New York,*  
126 N.J.L. 164, 18 A. (2d) 37.

The second and third headnotes of this case read:

“An insured farmer and dairyman who was unable to do the things required in his calling was ‘totally and permanently disabled’ within disability provisions of life policies, notwithstanding he was able to do many things such as going to the bank, tending to incidental chores about the farm, paying the help, keeping accounts, riding in automobile when milk was delivered to retail trade by his son, and acting as secretary to the local school board.”

"In action for disability benefits under life policies, evidence was sufficient for jury concerning disability of insured for the period of time for which suit was brought".

**7. Persons suffering from arthritis to extent that they cannot perform substantial and material acts of an occupation are held to be totally and permanently disabled, though they can perform some tasks.**

The evidence shows the plaintiff, Thomas J. Hughes, to be suffering from a bad case of arthritis, so that he is able to do but a few trivial things. Persons suffering from arthritis which prevents them from performing the substantial and material acts of an occupation in the usual and customary manner, though they can do some work are held to be totally and permanently disabled.

*Hoover v. Mutual Trust Life Ins. Co.* (supra).

*Colovos v. Home Life Ins. Co. of New York* (supra).

Other cases so holding are:

*Aetna Life Ins. Co. v. Spencer*, 182 Ark. 496, 32 S.W. (2d) 310.

*New York Life Ins. Co. v. McLean*, 218 Ala. 401, 118 So. 753.

*Guy v. Aetna Life Ins. Co.*, 206 N.C. 118, 172 S.E. 885.

*New York Life Ins. Co. v. Best*, 157 Miss. 571, 128 So. 565.

*Aetna Life Ins. Co. v. Norman*, 196 Ark. 381, 117 S.W. (2d) 728.

8. **Law does not require insured to perform duties at peril of health or if performance entails pain and suffering which persons of ordinary fortitude would be unwilling to endure.**

The evidence in this case discloses that the doing of any work by the plaintiff, exercising or even writing, causes him great pain, makes him sick, unable to sleep and causes his joints to become inflamed and his arthritis to be worse. Aside from this, the plaintiff is all right organically. The law does not require an insured to perform duties at the peril of his health, although he may have the strength, nor perform them if their performance entails suffering and pain which a person of ordinary prudence or fortitude would be unwilling or unable to endure. The fact that an insured suffering a disability does work is not the proper test to be used in determining whether such insured person is totally and permanently disabled. The true test is whether or not he is able to work, as a disabled person may work when due prudence would require him to desist from working. The issue of insured's ability to work is question of fact for jury to determine. Many of the cases heretofore cited are authority for the foregoing statements. (See *Aetna Life Ins. Co. v. Norman*, *supra*) Other cases to the same effect are:

*Aetna Life Ins. Co. v. Davis*, 187 Ark. 398, 60 S.W. (2d) 912.

*Fitzgerald v. Globe Indemnity Co.*, 84 Cal. App. 689, 258 P. 458.

*Massachusetts Bonding & Ins. Co. v. Worthy* (Tex), 9 S.W. (2d) 388.

*Temples v. Prudential Ins. Co.*, 18 Tenn. App. 506, 79 S.W. (2d) 608.

*Wright v. Prudential Ins. Co.*, 12 Cal. App. (2d) 195, 80 P. (2d) 752.

*Millis v. Cont. Life Ins. Co.*, 162 Wash. 555, 298 P. 739.

*Mutual Life Ins. Co. v. Dowdle*, supra.

**9. Insured, whose disability prevents him from working with reasonable continuity is totally and permanently disabled even though he is able to work at times.**

Many of the courts hold that although an insured may do work at times, he is totally and permanently disabled within the meaning of the disability clause of his policy, if he cannot work with reasonable continuity. Some of the cases heretofore cited announce this rule. Other cases so holding are:

*Wilson v. Metropolitan Life Ins. Co.*, 187 Minn. 462, 245 N.W. 826.

*Misskelley v. Home Life Ins. Co.*, 205 N.C. 496, 171 S.E. 862.

*Carson v. New York Life Ins. Co.*, 162 Minn. 458, 203 N.W. 209.

*Leonard v. Pacific Mutual Life Ins. Co.*, 209 N.C. 523, 183 S.E. 723.

In *Leonard v. Pacific Mutual Life Ins. Co. of Calif.*, the case last above cited, the facts were that a farmer who had an insurance policy providing for certain benefits in the event he became totally and permanently disabled, suffered a disability due to some nervous

infection that caused him to be sore and nervous. He could work at times. He could not, however, work with reasonable continuity. The plaintiff's evidence in this North Carolina case was somewhat conflicting. The testimony of some of the plaintiff's witnesses did not tend to support his claim of total and permanent disability. At the close of the plaintiff's case the defendant insurance company moved to dismiss the action, and for judgment as of nonsuit upon the ground that plaintiff had failed in his proof. The lower court upheld the defendant's contention and judgment was rendered against the plaintiff, whereupon he appealed. The Supreme Court of North Carolina held that whether the insured farmer was totally and permanently disabled within the disability clause of his policy was a question for the jury to decide and reversed the case, even though the plaintiff's own evidence was somewhat conflicting. Reading at page 725 of Vol. 183 South-eastern Reporter, we quote the following from the opinion of the case:

“While there are other portions of the testimony of these witnesses that do not tend to support the contentions of the plaintiff, all of the evidence, when construed in the light most favorable to the plaintiff, we think was sufficient to be submitted to the jury, and therefore hold that the trial judge erred in sustaining the motion for judgment as of nonsuit.”

10. In cases where there is evidence of a capital investment and its management the test of total disability of insured is whether he would be able to procure employment in the open labor market in the same capacity in which he is managing his investments and is jury question.

It was brought out in the evidence in the case at bar that the plaintiff was the owner of a 412 acre farm and dairy from which he received an income; that he was able to give his investment some management, although such management was very slight. The fact that an insured receives income from his investments does not negative his right to recovery under a disability clause in an insurance policy such as that involved in the case at bar. Furthermore, in a case where there is evidence of disability on the part of an insured, and also evidence of a capital investment and some management thereof by the insured, the test of total disability of the insured is whether he would be able to procure employment in the open market in the same capacity in which he is managing his investments, and under the evidence is a question of fact for the jury to decide. As authority we cite the following cases:

*Boughton v. Mutual Life Ins. Co.*, 183 La. 908, 165 So. 140.

*Lorentz v. Aetna Life Ins. Co.*, 197 Minn. 205, 266 N.W. 699.

*Bubany v. New York Life Ins. Co.*, 39 N.M. 560, 51 P. (2d) 864.

*Pacific Mutual Life Ins. Co. v. McCrary*, 161 Tenn. 389, 32 S.W. (2d) 1052.

*Mercantile Commerce Bank & Trust Co. v. Equitable Life Assur. Soc.* (D.C.), 48 Fed. Supp. 561.

*Comfort v. Travelers Ins. Co.* (Mo.), 131 S.W. (2d) 134.

*Erreca v. Western States Life Ins. Co.* (supra).

*Hoover v. Mutual Trust Life Ins. Co.* (supra).

*Mutual Life Ins Co. v. Dowdle* (supra).

*John Hancock Mut. Ins. Co. v. Magers* (supra).

*Anair v. Mutual Life Ins. Co. of New York*, 114 Vt. 217, 42 A. (2d) 423, is another case dealing with a capital investment, income therefrom, and some management thereof. This is another case against this same defendant involving the same disability clause in question. The insured, prior to becoming disabled, was a lawyer and stenographer. Her disability forced her to give up this work. She bought an apartment house, supervised its remodeling, attended to purchasing of furniture, various other things, and the renting of apartments; she collected rents, handled coupons for oil which the tenants used, and hired the cleaning work done, which she supervised. When she attempted to do some of the work, she had to go to bed. She had done some sweeping, had attempted to do some scrubbing, but when she attempted to move or lift furniture she suffered for it. When she exercised she had shortness of breath and she was dizzy a great deal of the time. At the close of the plaintiff's case, the defendant company moved for a directed verdict upon the ground

that there was no evidence in the case to support a finding that the plaintiff was totally disabled within the meaning of the policy and that the evidence showed that at all material times plaintiff followed a gainful occupation of managing an apartment house with no impairment which continuously rendered it impossible for her to carry on that occupation.

Reading at page 430, paragraphs 11, 12 of the opinion, 42 A. (2d), the court said:

" . . . we are unable to say as a matter of law that the plaintiff was not totally disabled in contemplation of the provisions of the policy in question. The evidence made the question of the plaintiff's total disability one of fact for the jury under proper instructions".

At page 431, paragraph 13 of the opinion the court further said:

"In cases such as this which involve a capital investment and its management, a test of the total disability of the insured is whether he would be able to procure employment in the open labor market in the same capacity in which he is managing his investments". (citing cases)

At page 433, paragraph 21, the court said:

"It is universally held that the fact that an insured receives income from his investments does not deprive him of his right of recovery under a total disability provision such as the one here in question. (citing cases) The fact that an insured may be able to do some acts

or perform some duties in connection with the management of his investment does not bar him from a recovery if he is disabled from following that occupation under the test set forth in the Clarke case, *supra*".

The citation to the Clarke case referred to is:

*Clarke v. Travelers Ins. Co.*, 94 Vt. 383, 111 A. 449, 450.

This Clarke case likewise holds that evidence of this type makes the question of disability one of fact for the jury, and that the court cannot say, as a matter of law, that the insured is not totally disabled. Other cases in which the court held similar evidence sufficient to take the case to the jury are:

*Kane v. Metropolitan Life Ins. Co.*, 228 Mo. App. 649, 73 S.W. (2d) 826.

*Stoner v. New York Life Ins. Co.* (Mo. App.), 90 S.W. (2d) 784.

*Aetna Life Ins. Co. v. Phifer*, 160 Ark. 98, 254 S.W. 335.

*New York Life Ins. Co. v. Bain*, 169 Miss. 271, 152 So. 845.

**11. Disability insurance is not indemnity against loss of income but against loss of capacity to work for compensation or profit.**

Policies providing benefits for the insured in the event he becomes totally and permanently disabled are not indemnity against loss of income, but against loss

of capacity to work for compensation or profit. This is the holding in *Erreca v. Western States Life Ins. Co.*, *supra*, *Mutual Life Ins. Co. v. Dowdle*, *supra*, and other cases heretofore cited. To the same effect is:

*Great Southern Life Ins. Co. v. Johnson* (Texas)  
25 S.W. (2d) 1093.

- 12. Evidence to the effect that insured does work or does earn is not sufficient to take the question of total and permanent disability from the jury if there is also evidence that insured is suffering a disability.**

The fact that an insured suffering disability holds down a job and earns an income does not necessarily preclude recovery under the disability provisions of a policy or negative total and permanent disability. While what an insured does or earns is a fact to be considered by the jury in determining total disability, the test of total and permanent disability is not what an insured does or earns. The test is what the insured is able to do. When an insured proves that he is suffering a disability, then the issue of whether or not he is totally and permanently disabled within the meaning of those words as used in an insurance policy, becomes a question of fact for the jury to decide. It is not one of law for the court to decide.

Authority for this theory is borne out by many of the cases heretofore cited and as further authority we cite.

*Caldwell v. Volunteer State Life Ins. Co.*, 170 S.C. 294, 170 S.E. 349.

In this above cited South Carolina Case a directed verdict was granted upon motion of the defendant insurance company. The facts were that the insured was a clerk of a court. He had been adjudicated insane but he thereafter continued to act as clerk and to draw his salary. In a suit to recover disability benefits under the terms of a policy the testimony touching the mental and physical condition of the insured was conflicting. Upon appeal, the Supreme Court, notwithstanding the fact that the insured continued to hold his position and draw a salary, reversed the trial court and in so doing held that the issue of the insured's total and permanent disability was a question of fact for the jury to determine. The First, Second, Third and Fourth Headnotes to this case read as follows:

"In action on disability policy, whether condition of insured was such as to constitute permanent total disability held for jury.

In passing on motion for nonsuit and for directed verdict, evidence must be taken in light most favorable to plaintiff.

In passing on motion for nonsuit and for directed verdict, it is not court's function to weigh testimony, but to determine if there is any relevant competent testimony reasonably tending to establish material elements of plaintiff's cause of action.

In action on disability policy, whether insured clerk of court who was adjudged insane, but continued to act as clerk, was permanently

disabled, and whether he was incapable of furnishing proof of such disability, and whether beneficiary gave notice with reasonable promptness, held for jury."

**13. Absolute lack of earning power or ability to do any work not required in order to be classed as totally and permanently disabled.**

The evidence in this case shows the plaintiff to be a member of the council of a Water Users' Association which regularly meets four times a year and that he is able to attend most of these meetings with the aid of friends. The plaintiff receives \$4.10 for each meeting he attends. This fact does not preclude recovery. Compensation received by an insured for services performed would have to be substantial, the work done amount to a job, together with ability to do the job, in order to defeat recovery. Recovery for total permanent disability does not require absolute lack of earning power on the part of the insured. Such is the ruling in:

*Colovos v. Home Life Ins. Co.* (supra).

*Dunlap v. Maryland Casualty Co.*, 203 S.C. 1, 25 S.E. (2d) 881.

*Pacific Mutual Life Ins. Co. v. McCrary*, 161 Tenn. 389, 32 S.W. (2d) 1052.

*Principi v. Columbian Mutual Life Insurance Co.*, 169 Tenn. 276, 84 S.W. (2d) 587.

*Burns v. Aetna Life Ins. Co.*, 234 Mo. App. 1207, 123 S.W. (2d) 185.

*Equitable Life of U. S. v. Boyd*, 51 Ariz. 308, 76 P. (2d) 752.

14. **Insurer cannot avoid payment of benefits because theoretically insured could educate himself for non-manual employment or because of possibility he might fit himself for some calling.**

Defendant's counsel cross-examined plaintiff at length concerning his education and brought out that for three or four years he had attended a normal school or teacher's college, the curriculum of which combined high school and normal school subjects. The plaintiff had not obtained a teacher's certificate or ever taught school. The plaintiff is a man seventy-two years of age and has been a farmer most of his life. He is so disabled that he cannot work or even sit at a desk and write for any length of time (87). The only conclusion that can be drawn from the evidence taken as a whole is that the plaintiff cannot now, nor could he at any time since he became disabled, fit himself for, or do, any type of work at all which would produce a livelihood. The defendant was advised that the plaintiff was a farmer in his application for the policy (16).

If there were a possibility that the plaintiff could fit himself for some other remunerative occupation, the defendant cannot urge the point. The law is settled that an insurer cannot avoid the payment of benefits because theoretically the insured could educate himself for non-manual employment or because there is a mere possibility that by education or otherwise he might at some time in the future in some way fit himself for some calling and become able to earn a living. The plaintiff, in this case, considering his age and crippled up condition, could not reasonably be expected

to complete his education to become a school teacher and then teach school. As authority for this contention we cite the following cases:

*Buis v. Prudential Ins. Co.* (Mo. App.), 77 S.W. (2d) 127.

*Gibson v. Equitable Life Association Society* (Utah), 36 P. (2d) 105.

*Nickolopoulos v. Equitable Life Assur. Soc. of U. S.*, 113 N.J.L. 450, 174 A. 759.

*Jefferson Standard Life Ins. Co. v. Curfman*,  
supra.

**15. Not essential to entitle insured to receive benefits in case of his total and permanent disability, that he establish he will be disabled remainder of his life.**

As to the permanency of the disability of the plaintiff in the case at bar there can be no doubt. The evidence conclusively discloses that the plaintiff became totally disabled in the year 1935; that his disability has become progressively worse ever since that time, and that he will continue to get worse until absolutely helpless in bed (94-95). This proof is of greater quantum than required to establish permanency of disability in this type of case. The proof required to establish permanency of disability is passed upon in:

*Johnson v. Mutual Life Insurance Co.*, 269 Ill. App. 471.

This Illinois case construes the identical disability provision involved in this case against this same defendant insurance company. The court's ruling is reflected in the First and Second Headnotes to the case, which read as follows:

"1. Where an insurance policy providing for total and permanent disability benefits also provides that the insurer will, 'during the continuance' of the disability, waive the payment of premiums and will pay the insured a specified income, and that the insurer may, at any time, have the insured examined to determine whether or not he is totally and permanently disabled, and that if it shall appear that he is able to work, no further premium shall be waived or income paid, it is not essential, to entitle the insured to receive such benefits in case of his total and permanent disability, that he shall establish that he will be disabled for the remainder of his life, but whenever it appears that the plaintiff is totally disabled and that this disability will, as far as can be ascertained at the time, be permanent, the insured should receive the income and have the premiums waived from the time the fact of disability is determined until he recovers or dies.

2. Whether one who contracted pulmonary tuberculosis would, within the meaning and provisions of the disability clause of an insurance contract under which he sought to recover, be totally, permanently, continuously and wholly prevented from performing any work for compensation and from following any gainful occupation, was a question of fact for the jury to determine from a consideration of the testimony."

**16. Other cases against this defendant which uphold the plaintiff's contentions in this case.**

The following are citations to other cases against this same defendant interpreting the identical disability clause in question, and other clauses of similar meaning. These cases uphold the plaintiff's contentions in this case, and involve farmers and other persons who have been held to be totally and permanently disabled where they could not perform the substantial and material acts of an occupation in a customary and usual manner, although they could give some supervisory attention, perform tasks of a sporadic nature, or do light work:

*Mutual Life Insurance Co. v. Oliff*, 62 Ga. App. 845, 21 S. E. (2d) 534.

*Mutual Life v. McDonald*, 25 Tenn. App. 50, 150 S. W. (2d) 715.

*Mutual Life v. Marsh*, 186 Ark. 861, 56 S. W. (2d) 433.

*Phillips v. Mutual Life*, 155 So. 487 (La. App.).

*Losnecki v. Mutual Life*, 106 Pa. Super. Ct. 259, 161 A. 434.

*Smith v. Mutual Life* (La. App.), 165 So. 498.

*Mutal Life Ins. Co. v. Childs*, 64 Ga. App. 657, 14 S. E. (2d) 165.

*Boughton v. Mutual Life*, 183 La. 908, 165 So. 140.

*Brown v. Mutual Life* (Mo.), 140 S. W. (2d) 91.

*Mutual Life v. Beckman*, 261 Ky. 286, 87 S. W. (2d) 602.

*Mutual Life Ins. Co. v. Rackley*, 66 Ga. App. 89, 17 S. E. (2d) 190.

**17. The few early cases holding disability provision should be literally construed no longer sound law.**

There are a few early cases which adhere to a strict rule of interpretation of the words used in the disability clause of an insurance policy. These cases are no longer sound law. This is pointed out in a discussion of this matter by the writer in :

149 A.L.R. 11, 12.

This writer, in speaking of the more liberal rule, states as follows:

“ . . . This rule is so general and so well settled that it is needless to cite authorities for it.”

The writer speaks of Iowa at one time adhering to the more literal construction, but points out that the Iowa court expressly overruled this construction in *Hoover v. Mutual Trust Life Insurance Co.* (supra).

**18. Insurance company cannot prevail in claiming that disability clause does not cover risks which it has been adjudicated to cover under consistent judicial course of construction.**

When the defendant in this case issued the type of policy involved herein, providing for certain disability benefits, it knew the risk it was assuming, fixed the amount of premium accordingly, and the defendant

should not be permitted to now shirk its obligation under the contract. The courts for many years have interpreted the meaning of disability clauses of similar import to the one used in the policy involved in this case. In this brief we have cited quite a number of cases against this same defendant where the courts have, over the years, interpreted the identical disability clause involved in this case. When the defendant issued its policy to the plaintiff in this case, it knew that the courts had theretofore construed the words "totally and permanently disabled" as used in the policy not to mean, as their literal construction might be claimed to require, a state of absolute helplessness, but that such words contemplate, rather, such a disability as renders the insured unable to perform, in the customary and usual manner, the substantial and material acts of his occupation or any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity. Accordingly the defendant cannot now claim that those words should be literally construed so as to preclude recovery in this case.

In the case of *Prudential Ins. Co. v. Harris*, 254 Ky. 23, 70 S.W. (2d) 949, the court used the following language (reading at pages 953 and 954, 70 S.W. (2d)):

"It has been said, and no doubt is true, that uniformity of decision on questions of insurance in the several states is very desirable and necessary, and where an insurance company con-

tinues to issue policies without any modification of their terms, after certain provisions thereof have been judicially construed, it should not be heard to insist, in controversies between itself and the insured with respect to such subsequently issued policies, that they do not in fact cover risks which they had been adjudged to cover before they were issued . . .”.

“. . . But, when contracts have been made under the authority of a consistent judicial course of construction, it should be a very compelling situation that would warrant a change which would adversely affect rights acquired under that policy.”

**9. Insurance policy should be construed most strongly against the company.**

An insurance policy is not written as the result of negotiations between the parties to the contract, but is prepared by one party only, the company. Such policy should be construed most strongly against the company and most favorable to the insured.

*Gibbons v. Metropolitan Life Ins. Co.* (1938), 62 Ohio App. 280, 23 N. E. (2d) 662, (Affirmed in 1939, 135 Ohio St. 481, 21 N. E. (2d) 588).

*Industrial Mutual Indemnity Co. v. Hawkins*, 94 Ark. 417, 127 S.W. 457.

**0. Liberal construction rule prevails in this jurisdiction.**

The contention that the words “totally and permanently disabled” as used in an insurance policy should be construed liberally rather than literally has

been upheld in this jurisdiction by the following Arizona and Ninth Circuit Court cases:

*Equitable Life Assur. Soc. of U. S. v. Boyd*, 51 Ariz. 309, 76 P. (2d) 752.

*U. S. v. Lawson* (CCA 9th), 50 F. (2d) 646.

*U. S. v. Sligh* (CCA 9th), 31 F. (2d) 735.

## **21. Conclusion.**

The questions involved in this case have been in the courts many times. The cases on the subject are collected in a number of annotations in A.L.R. An examination of these annotations will disclose that the theory and contentions of the plaintiff in the case at bar are correct. The citations to the more recent and most extensive of these annotations are:

79 A.L.R. 857.

98 A.L.R. 788.

149 A.L.R. 7.

Earlier annotations are found in:

24 A.L.R. 203.

37 A.L.R. 151.

41 A.L.R. 1376.

51 A.L.R. 1048.

We respectfully submit that at the close of the plaintiff's case there was, under the well established law, ample evidence to require submission to the jury for determination the question of whether the plaintiff had become totally and permanently disabled within the meaning of his policy. To hold otherwise would be equivalent to a practical denial of that which the premium was supposed to be buying, as was said in *Prudential Insurance Company v. Harris*, 254 Ky. 23, 70 S. W. (2d) 949, and as was said in *Equitable Life Assur. Soc. v. Serio* (*supra*) would convict an insurance company of having put out among our people and having collected from them premiums on a policy provision which in effect would be scarcely more than a cheat, a pre-  
ense and a fraud.

The plaintiff respectfully asks that the judgment and ruling of the trial court be reversed, and the case remanded to the District Court for a new trial.

Respectfully submitted,

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**No. 12,202**

IN THE  
**United States  
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THOMAS J. HUGHES,

*Appellant,*

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THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,

*Appellee.*

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**APPELLEE'S BRIEF**

Upon Appeal from the District Court of the United States  
for the District of Arizona

---

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JUN 2 1949

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

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**APPELLEE'S BRIEF**

Upon Appeal from the District Court of the United States  
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---

**STATEMENT OF THE CASE**

Plaintiff's statement of the case is unacceptable, because it is argumentative, in that it assumes as established facts highly controverted assertions that plaintiff, at all times in issue, was physically disabled from doing more than trivial tasks, and that his income was received from capital investments, and that he was totally and per-

manently disabled under the terms of the policy. His statement is not an impartial and analytical resumé of the ultimate facts: It is a synopsis of his argument. A more comprehensive and less controversial statement follows.

In June, 1923, plaintiff applied for, and received from defendant, a policy of life insurance which included provisions for payment to him of monthly income and for waiver of premiums in the event that he became, and for so long as he continued to be totally and permanently disabled as defined in the policy; i.e.:

“\* \* \* totally and permanently disabled by bodily injury or disease, so that he is, and will be, permanently, continuously and wholly prevented thereby from performing any work for compensation, gain or profit, and from following any gainful occupation.”

The policy was rewritten and reissued upon plaintiff's application, in July, 1925, with modifications which are not material to this controversy.

In 1932, and again in 1935, plaintiff sustained injuries to his spine. Following the second injury, he applied for total and permanent disability benefits, and he received from defendant between July 15, 1935, and January 1, 1942, the monthly income payments and waiver of premiums. These benefits were discontinued by defendant on the ground that plaintiff was not totally and permanently disabled.

No disability benefits have been allowed since January, 1942. Plaintiff has paid all premiums since then under protest. Six years later, in January, 1948, he instituted this suit. The gist of his complaint is that, at all times

since February, 1935, he has been totally and permanently disabled by bodily injury and disease from performing any work for compensation, gain or profit and from following any gainful occupation whatever (R. 6).

The suit was filed in the Superior Court of Arizona, but it was removed by defendant for diversity of citizenship. At the close of the evidence submitted by plaintiff at the trial, the court, upon defendant's motion, directed a verdict and entered judgment for defendant. Plaintiff's motion for a new trial was denied, and plaintiff perfected this appeal.

Plaintiff was seventy-two years old when the case was tried (R. 155). According to his physician, he was an active man, mentally alert and organically sound (R. 100), but he was afflicted with chronic multiple hypertrophic arthritis which had its onset in 1935.

Plaintiff was born and reared on a Kansas farm, and, although he was educated for four years in normal schools to become a teacher, farming has been his principal lifetime occupation (R. 110, 111).

He has resided and operated a farm near Tempe, Arizona, continuously since before he contracted arthritis. He has kept the land under cultivation and has raised hay and grain. He has maintained a dairy herd and some calves, steers and other livestock on the place. During this period of time, his acreage has increased to 412 acres, his dairy herd has increased to 55 or 60 head of cows, and his calves and steers have increased to 75 head, and his farming operations produce more income than they did back in 1935 (R. 122 to 125; 133, 134, 137, 138, 145, 150, 207). (These activities will be discussed more extensively during the argument.)

His dairy operations have produced a monthly income from \$800.00 to \$1000.00 per month. He has leased 185 acres of farm land at rentals from \$35.00 to \$38.00 per acre per year. The annual income from these sources alone produces an annual income from \$16,000.00 to \$19,000.00. He has also sold grain, hay and livestock from his farm, as to which no income figures were supplied (R. 124, 138, 140, 146; 148 to 151; 189).

Acting for and on behalf of a nonresident sister, he advertised and leased a 40-acre tract of land near Phoenix, Arizona, and arranged to have it prepared to raise barley, and to have the barley planted, harvested and stored (R. 143 to 145; 166, 167).

He personally keeps his own books, and makes his own entries therein of sales, purchases, expenses, etc. (R. 155 to 158), and he pays all bills when due in their ordinary course, pursuant to statements which are brought to him for checking (R. 204).

He has borrowed money, signed loan applications, notes and mortgages, and he has retired the debts represented thereby (R. 138, 163, 164, 167, 182, 183).

He served as the Administrator of a decedent's estate, and in such capacity asked for additional compensation for extraordinary services in such capacity (R. 184 to 188).

He has served as the president of a rural school district, and as Vice Chairman and Chairman of the Council of the Salt River Valley Water Users Association, continuously since before he contracted arthritis (R. 106, 107, 112, 113, 197). (These activities will be discussed more extensively during the argument.)

Other activities in which he has participated, either immediately prior to the discontinuance of disability benefits or during the period of time involved in this suit, include: Service as a member of a labor committee for the Salt River Valley Water Users Association, in 1941 and 1942; service as an accredited representative of such Association for a tax conference in Washington, D. C., in 1942 (R. 194, 198 to 200); occasional operation of his automobiles (R. 104); and two long automobile trips of one day duration each, when he went to Flagstaff, Arizona, in 1947, and to Santa Ana, California, in 1948 (R. 131, 132, 191).

#### **SUMMARY OF ARGUMENT**

1. *There is no issue as to the interpretation of the policy*, because no ambiguity therein is presented. The test of total disability is not whether plaintiff can do all or even substantially all of the things he did when he was younger and before he developed arthritis, but is whether he can pursue, with reasonable continuity, his customary occupation or some other occupation for which he is qualified by education, station in life, age and physical and mental capacity.

2. *The cases discussed in plaintiff's brief are distinguishable*, in that an analysis thereof reveals that different fact situations and different issues arose therein than such as are presented here.

3. *The cases cited by defendant are persuasive*, because they deal with farm management and executive occupations and activities similar to the occupations and activities in which this plaintiff is engaging, and the issue of law were identical to such as are presented here.

4. *The theory of common care and prudence is not applicable here*, because it is a doctrine to be considered only when the insured actually abandons his occupation, or endeavors unsuccessfully to perform odd jobs or sporadic tasks, and when it appears that to work actually jeopardizes his life or his health. It is not applicable where, as here, the insured actually follows a gainful occupation, and it appears that the only effect thereof is to aggravate arthritic pain.

5. *The theory of income from capital investment is not applicable*, because the undisputed evidence established that plaintiff's income, during the entire six-year period involved in this action, has been derived exclusively from the same occupations which he followed before he developed arthritis, and that these are the occupations for which he is fitted by education, station in life, age and physical and mental capacity.

6. *There was no competent evidence advanced at the trial which would entitle plaintiff to demand or to receive total disability benefits under the policy*, and the trial court properly directed a verdict for defendant.

## ARGUMENT

### **1. There Is No Issue as to the Interpretation of the Policy.**

Plaintiff's argument on his points numbered 12 to 20, inclusive (Br. 46 to 53), is surplusage.

It is not entirely clear what is meant by his contention that the policy is to be construed for him and against the defendant. Such might be the rule if an ambiguity were presented. Here there is no ambiguity, hence no need for construction. *Prudential Ins. Co. of America v. Wolfe*, (C.C.A. 8), 52 F.2d 537.

Of course, if plaintiff were to maintain that total disability and partial disability were the same, then his so-called "liberal rule of construction" would be illogical, because there is no occasion to import into this policy such an ambiguity nor to force from its plain words such an unusual and unnatural meaning. *Aronson v. Mutual Life Ins. Co. of New York*, 313 Ill. App. 35, 38 N.E. 2d 976.

Defendant does not maintain, as suggested on pages 46 to 49, of plaintiff's brief, that plaintiff was required to establish absolute lack of earning power or ability to work, or that he will be disabled throughout his lifetime, or that he was required to educate himself for nonmanual employment. Defendant does maintain that the question of total disability is a relative one, to be determined largely in the light of the capabilities and training of the insured, *Cleveland v. Sun Life Assur. Co. of Canada*, 13 W.2d 318, 125 P.2d 251, and that the test is not whether he can do all or even substantially all of the things which he did in following his occupations before he became afflicted with disease and was younger, but rather whether or not he could work, as stated in plaintiff's Specification of Error (Br. 12) :

"\* \* \* with reasonable continuity in his customary occupation or in any other occupation in which he might reasonably be expected to engage in view of his station in life, age and physical and mental capacity."

## **2. The Cases Discussed in Plaintiff's Brief Are Distinguishable.**

Plaintiff has cited sixty-nine cases, but has discussed or quoted from nine of them only.

These nine cases, with the exception of *Prudential Ins. Co. v. Harris*, (Br. 52, 53), generally adhere to the test of

total disability stated hereinbefore. The excepted case, because of *stare decisis*, treats the policy as though it insured against disability in the insured's own occupation.

The case of *Anair v. Mutual Life Ins. Co. of N. Y.*, (Br. 41 to 43), gives recognition to the principle that each case must be decided upon its own facts, with no necessity for the court to review all cases cited. This case will be discussed in connection with the "capital investment" theory, *infra*.

The case of *Johnson v. Mutual Life Insurance Co.*, (Br. 48, 49), deals with the matter of permanency of illness and disability, which is not an issue here.

The following conclusions apply to the group of nine cases under consideration:

(1) None of these cases was decided by the Supreme Court of Arizona or by the Ninth Circuit Court of Appeals.

(2) In the *Harris* and *Anair* cases, *ante*, as well as in *Erreca v. Western States Life Ins. Co.*, (Br. 15, 16), *Mutual Life Ins. Co. v. Dowdle*, (Br. 30 to 32), *John Hancock Mutual Ins. Co. v. Magers*, (Br. 34), and *Raub v. Mutual Life Ins. Co. of N. Y.*, (Br. 35, 36), the courts were considering the propriety of submitting the cases to the jury, on appeals by the insurance companies from verdicts and judgments for the parties insured.

(3) In the *Erreca*, *Dowdle* and *Magers* cases, *ante*, as well as in *Leonard v. Pacific Mutual Life Ins. Co.*, (Br. 38, 39), each insured party was found to be wholly unable to manage his farm, and was also found to have abandoned management to others.

In the *Erreca* case, the insured was forced to abandon management and control of his farm to his son, and of

his dairy to his partner, because of his shortness of breath, rapid heart, and inability to stand on his feet for more than brief periods of time. The evidence established that he could not perform any essential supervisory function.

In the *Dowdle* case, the evidence tended to establish that the insured was physically unable to give detailed attention to the duties of farm management. Even so, the court acknowledged that the matter of total disability was a perplexing question.

In the *Magers* case, the insured was compelled by physical disability to employ a manager to operate his farms and the insured only visited some of his farms on three or four occasions per year. Before his disability, the insured had never employed a foreman, and had made up his own payroll, paid his men and marketed his farm products.

In the *Leonard* case, the insured was compelled to turn over the management of his farm to his brother.

(4) In the *Anair* and *Leonard* cases, *ante*, as well as in *Caldwell v. Volunteer State Life Ins. Co.*, (Br. 44 to 46), each insured party was found to be unable to manage his or her own business, and, due to mental disability, was precluded from following any gainful occupation, although it did appear in the *Caldwell* case that the insured, who had been adjudicated mentally incompetent and who had a court appointed guardian, held office as a court clerk and signed papers prepared and presented to him by a deputy.

(5) In the *Harris* case, *ante*, the insured had quit his job as a pipe fitter, because of physical inability to con-

tinue his line of work, and in the *Raub* case, *ante*, the court accepted as a proved fact that the insured was forced by physical disability to lead an entirely different manner of life, and could no longer do the things required of a farmer and dairyman.

### **3. The Cases Cited by Defendant Are Persuasive.**

Defendant believes that the following nine cases are persuasive that the trial court properly directed a verdict in the case here under consideration.

#### **(a) CASES DEALING WITH FARM MANAGEMENT.**

(1) The case of *Ireland v. Mutual Life Ins. Co. of N.Y.*, 226 N.C. 349, 38 S.E. 2d 206, is very close in point. The facts established by the evidence are substantially identical, as far as they went, with those established by the evidence here. Like the case of *Leonard v. Pacific Mutual Life Ins. Co.*, case cited by plaintiff and discussed hereinbefore, it was decided by the Supreme Court of North Carolina.

The insured, who had been a farmer all of his life, and who so stated in his application for insurance from the Mutual Life Insurance Company of New York, and who was sixty years of age, sought and recovered a verdict and judgment for total and permanent disability benefits under his policy. He claimed to be totally and permanently disabled from arthritis which had its onset in 1937, but he didn't file suit for benefits until several years later.

The insured maintained that his knees and other joints were affected by arthritis, and that he suffered pain constantly, so as to be unable to plow, disc, gather crops, or to keep books and records, or to manage and supervise

his farms, consisting of 481 acres in cultivation and other acreage. He also maintained that he had difficulty in walking, and that when he took long automobile trips, he was driven by others.

The judgment rendered in his behalf was reversed on appeal for failure of the lower court to direct a verdict for the Mutual Life Insurance Company of New York. In so doing, the Appellate Court held that Mr. Ireland, as a matter of law, was not totally disabled, because his testimony and the testimony of his witnesses established that: He made purchases and sales of livestock and farm products; he was well educated, had an alert mind, and was a good executive; he and his wife executed notes and mortgages, and discharged the debts represented thereby; he paid out the money necessary to meet the expenses and purchases incidental to his farming operations, and demonstrated complete familiarity with the details thereof.

(2) *Cleveland v. Sun Life Assur. Co. of Canada*, 13 W.2d 318, 125 P.2d 251, supports the rule that an arthritic, who engages in agricultural activities and is able to pursue recreational activities, as a matter of law is not totally disabled.

(3) In *Light v. Connecticut Gen. Life Ins. Co.*, (D. Ct. W.D. La.), 35 F. Supp. 691, it was held that the insured was not totally disabled because, with the aid of his wife, he raised cotton.

#### **(b) CASES DEALING WITH EXECUTIVE ACTIVITIES.**

(1) In *Aronson v. Mutual Life Ins. Co. of New York*, 313 Ill. App. 35, 38 N.E. 2d 976 (being the same court which decided *Johnson v. Mutual Life Insurance Co.*, cited by plaintiff and discussed hereinbefore), a judgment in

favor of the insured was reversed on the ground that a verdict should have been directed for the Mutual Life Insurance Company of New York.

The insured had been afflicted for several years with chronic osteo-arthritis, accompanied with pain and some rigidity. The company had allowed him total and permanent disability benefits therefor over a period of five years.

The evidence showed that the insured was not illiterate, and that he possessed business and managerial experience, and that, as the part owner and operator of an apartment hotel, he collected rents, made bank deposits, drew checks, met tradesmen, and, generally, successfully and profitably managed the business.

(2) In *Metropolitan Life Ins. Co. v. Alston*, 248 Ala. 671, 29 So. 2d 233 (and plaintiff cites a case from Alabama), it was held that the insured, as a matter of law, was not totally disabled, although he was afflicted with coronary thrombosis and was suffering pain, because it appeared from the evidence that he continued to serve as chairman of the board of directors of a company, and to preside at board meetings and to perform advisory functions.

(3) In *Thigpen v. Jefferson Standard Life Ins. Co.*, 204 N.C. 551, 168 S.E. 845, it was also held that the insured was not disabled, as a matter of law, because, while his ailments prevented him from continuing to care for his farm, he did serve as a township tax lister, and as a member of the county school board, and as a county court crier.

**(c) CASES DEALING WITH BOTH FARM MANAGEMENT AND EXECUTIVE ACTIVITIES.**

(1) In *Cobb v. Mutual Life Ins. Co. of New York*, 151 Pa. S.654, 30 A.2d 611 (and plaintiff cites a case from this court), a judgment in favor of the insured was reversed on the ground that a verdict should have been directed for the Mutual Life Insurance Company of New York.

The insured had been afflicted with hypertrophic arthritis and other ailments, accompanied with pain. The company had allowed him total and permanent disability benefits therefor over a period of five years.

The evidence established that the insured continued to operate a farm, with a superintendent and additional help, and that he continued to serve as a director of a bank and to attend the board meetings although he was unable to perform manual labor, and although his doctors expressed the opinion that he was unable to follow any occupation, the court said:

“\* \* \* In fact, he has carried on his farm and the various activities connected therewith without interruption, and has attended the meetings of his bank board. It is not essential that he should do, or be able to do, everything necessary to be done in the conduct of this enterprise (citing authority). But his own testimony discloses that he did, and had the ability to, perform a substantial and essential part of the duties incident thereto, even though he could not do manual labor.” (30 A. 2d 614.)

(2) In *New York Life Ins. Co. v. Howard*, 63 Ga. App. 865, 12 S.E. 2d 394, the court which decided several cases cited by plaintiff held that the insured, as a matter of law, was not totally disabled from a heart condition which

required him to desist from physical duties on his farm, and which, according to the medical testimony should require him to desist from all work, because the evidence established that he served as an executor of an estate, and as a member of his state's General Assembly, and that he managed his farm, and for the additional reason that the evidence did not show, either that his earnings were diminished or that he desisted from a substantial part of his total duties.

(3) *Azevedo v. Mutual Life Ins. Co. of New York*, 308 Mass. 216, 31 N.E. 2d 559, a judgment for the company was affirmed. The evidence showed that, by reason of impaired action in the insured's right arm, it was impossible for him to continue to milk his cows, plow his land, etc., but that he did, with the assistance of additional employees, buy and sell cows and farm produce, and manage the operations of his farm and dairy, and serve as a director of a milk distributing organization.

#### **4. The Theory of Common Care and Prudence Is Not Applicable Here.**

By his contention that the law does not require an insured to work at peril of his health, or if performance entails pain and suffering which persons of ordinary fortitude would not be willing to endure (Br. 37, 38), plaintiff seeks to invoke the "common care and prudence" doctrine, recognized in some jurisdictions, and which had its origin in cases where the insured *did not work* and was held to be justified in *desisting from work* upon proof that if he worked he would jeopardize his life or his health.

Some courts refuse to recognize the theory. Others recognize it, but apply it only when it appears affirmatively that the insured abandoned work. Others recognize and apply it when it is shown that the insured attempts to work but is unsuccessful in performance. None apply it when the insured follows his own or some other remunerative occupation.

Plaintiff cites a number of cases in which the theory was recognized and applied, or at least considered in the determination of the issues. These cases may be grouped, as follows:

(1) Cases where it appears that the insured actually abandoned work: *Aetna Life Ins. Co. v. Davis*, *Millis v. Continental Life Ins. Co.*; *Fitzgerald v. Globe Indemnity Co.*; and *Massachusetts Bonding & Ins. Co. v. Worthy*.

(2) Cases where it appears that the insured attempted, but failed, to conduct his own occupation: *Massachusetts Bonding & Ins. Co. v. Worthy*, and *Aetna Life Ins. Co. v. Norman*.

(3) Cases where the insured was unable to walk or to attend to his own personal affairs, *Aetna Life Ins. Co. v. Norman*, and cases where the insured was able to attend to his own personal affairs, but was unable to attend to the affairs of his occupation, *Fitzgerald v. Globe Indemnity Co.*

(4) Cases where the insured was afflicted with pulmonary tuberculosis, which is a disease that, as a matter of common knowledge, is seriously aggravated by activity, such as, *Aetna Life Ins. Co. v. Davis*, and *Millis v. Continental Life Ins. Co.*, as well as *U. S. v. Lawson* and *U. S. v. Sligh* (Br. 54).

(5) Cases where the insured made unsuccessful efforts to perform odd jobs, such as *Aetna Life Ins. Co. v. Davis*; *Temples v. Prudential Life Ins. Co. of America*; *Wright v. Prudential Ins. Co. of America*; and *Millis v. Continental Life Ins. Co.*, as well as *Equitable Life Assur. Soc. v. Boyd* (Br. 46, 54).

Although the Supreme Court of Arizona has not expressly adopted the "common care and prudence" theory, it has, in *Equitable Life Assur. Soc. v. Boyd, supra*, quoted from a federal decision where the doctrine was applied. However, in the Arizona case, a judgment for an insured nightwatchman for total disability benefits was affirmed because he didn't work with reasonable regularity and his scattered efforts to hold down odd jobs were futile, and in the federal case mentioned, the insured had died from pulmonary tuberculosis, and the medical testimony was that his activities had substantially impaired his health and had actually tended to shorten his life.

It is true that Dr. J. H. Patterson expressed the opinion that Mr. Hughes was totally and permanently disabled (R. 95), and, as indicated by his remarks set forth on page 29 of appellant's brief, he based this opinion upon his belief that activity would "irritate .the conditions present there and, naturally, would cause more pain," (R. 93, 99). It is likewise true that Dr. H. L. Goss stated that hypertrophic arthritis is a common condition in men past fifty years of age, many of whom continue to work (R. 79, 80), and that Dr. Patterson found plaintiff to be an active man, mentally alert, organically sound, and free from ailments other than arthritis (R. 100). Moreover, plaintiff testified, as follows:

"Q. Well, then, aside from the pain, you don't know of anything that is the matter with you, physically or mentally, do you?

A. No, I don't." (R. 196)

Cases holding that one who is engaged in his customary occupation, or in some other occupation or activities, is not, as a matter of law totally disabled, even though his work be accompanied with pain, include: *Ireland v. Mutual Life Ins. Co. of New York*, ante; *Cleveland v. Sun Life Assur. Co. of Canada*, ante; *New York Life Ins. Co. v. Howard*, ante; *Aronson v. Mutual Life Ins. Co. of New York*, ante; *Metropolitan Life Ins. Co. v. Alston*, ante; *Stewart v. Pioneer Pyramid Life Ins. Co.*, 177 S.C. 132, 180 S.E. 889, and *Lyle v. Reliance Ins. Co. of Pittsburgh, Pa.*, 197 Ark. 737, 124 S.W. 2d 958. Excepting the *Howard* and the *Alston* cases which deal with heart conditions, and the *Lyle* case which deals with rheumatism, the foregoing involve arthritis. (The *Lyle* case is from Arkansas, as are the cases of *John Hancock Mutual Insurance Co. v. Maggers*, and *Mutual Life Ins. Co. v. Dowdle*, cited along with six other Arkansas decisions, by plaintiff, and discussed hereinbefore.)

Cases holding that the testimony of a physician to the effect that the insured is totally and permanently disabled is without probative value when the evidence shows that the insured is actually pursuing an occupation with reasonable regularity, include: *Cobb v. Mutual Life Ins. Co. of New York*, ante; *Thigpen v. Jefferson Standard Life Ins. Co.*, ante; *Cleveland v. Sun Life Assur. Co. of Canada*, ante; *Deadrich v. United States*, 74 F.2d 619; and *United States v. Baker*, (C.C.A. 9), 73 F.2d 691.

The following remarks from the opinion of the Supreme Court of South Carolina (and plaintiff has cited the South Carolina case of *Caldwell v. Volunteer State Life Ins. Co.*, which is discussed hereinbefore), are apropos:

"In the present case the plaintiff's own statement of his claim of total disability consists of assertions in general terms of his pains and sufferings; but he continues at his work. The only evidence upon which plaintiff could rely to take the case to the jury was the assertion of the doctor of his opinion that plaintiff is totally and permanently disabled. We have seen by the decisions of our own Supreme Court that such medical opinion evidence, in the light of the undisputed facts, has no probative value. There is authority from other jurisdictions and from the United States Supreme Court sustaining the position taken by our Supreme Court." (180 S.E. 893).

As stated by the Supreme Court of Arizona, in *Cope v. Southern Pac. Co.*, 66 Ariz. 197, 204, 185 P.2d 772, 777:

"In *Steele v. Kansas City Southern Ry. Co.*, 265 Mo. 97, 175 S.W. 177, 181, it is said: '\*' \* \* We are not bound, even as an appellate court, to believe a mere witness in a case when it appears from conclusive physical facts or otherwise patently that such witness is either perjured or clearly mistaken. \* \* \*. To this observation we wholeheartedly subscribe."

##### **5. The Theory of Income from Capital Investments Is Not Applicable.**

In his specification of error (Br. 12), and throughout his argument, and specifically under a separate heading (Br. 40 to 43), plaintiff urges that the increases in his land, livestock and income throughout the six-year period

for which he claims total disability benefits, amount to a return on his invested capital and do not constitute the fruits of his industry and activities. This is obviously his chief contention on this appeal.

Plaintiff cites *Anair v. Mutual Life Ins. Co. of New York*, which is a clear case of return on capital invested, in that the insured, by reason of nervous and mental afflictions, was unable to concentrate or to continue her law practice, and so abandoned her usual occupation and acquired a small apartment house which, with virtually no management, returned her some income.

Other clear cases of capital investment cited by plaintiff are *Mercantile Commerce Bank & Trust Co. v. Equitable Life Assur. Soc.*, and *Comfort v. Travelers Ins. Co.*, in each of which it appeared that the insured received salary as president of a corporation by way of distribution of earnings rather than by way of compensation. The same idea prevails in *Lorentz v. Aetna Ins. Co.*, where businesses were conducted by employees on salaries and commissions, and in *Bubany v. New York Life Ins. Co.*, where income was received from rental properties and investments.

*Boughton v. Mutual Life Ins. Co.*, *Pacific Mutual Life Ins. Co. v. McCrary*, and *Hoover v. Mutual Trust Life Ins. Co.*, do deal with farm operations and the income derived therefrom, but in the *Boughton* and *McCrary* cases, the farms were operated through the media of tenant farmers, employees and relatives, and in the *Boughton* case, the cattle business was virtually abandoned and 350 acres of farm land were lost on tax sales, and in the *McCrary* case, the insured gave no personal attention to the farming operations. In the *Hoover* case, it appeared

that the insured merely gave directions to four employees, and the court said that such slight mental exertions did not amount to an occupation.

Although the court said in the *Anair* case that "*a test*" of total disability is whether the insured would be able to procure employment in the open labor market in the same capacity in which he is managing his investments (Br. 42), it did not say as plaintiff urges (Br. 40), that such would be "*the test*" of total disability. Such "*a test*" would not be applicable to a farm owner and operator who is capably handling his own profitable agricultural pursuits and other activities. If it were applicable, then there is no evidence upon which a jury could reach a conclusion that plaintiff could not obtain such employment, and it is axiomatic that a verdict cannot be predicated upon speculation, surmise or conjecture. On the other hand, there is uncontradicted competent evidence that plaintiff did manage the investments and affairs of others, and that he did so capably and efficiently.

Plaintiff concedes that the evidence shows that he has served on the school board, continuously, and on the Council of the Salt River Valley Water Users Association, continuously, and as the Administrator of an intestate's estate, and on behalf of a nonresident sister in the acquisition and operation of a farm (Br. 19 to 22; 30, 46), but he argues that each and all of these activities have been performed in a perfunctory manner.

With respect to his services on the school board, his own testimony shows that the school district operates two schools, that the school board passes upon leases, building projects, transportation, operating budgets, and determines all school and school district policies, and that

plaintiff is the president of the school board, and that he presides at the meetings, signs the minutes, and that he signs all checks for purchases and expenditures of the district (R. 112 to 122). According to his witnesses, Painter (a member of the school board), and Lynd (Rural Supervisor), the school building program and the district budgets and all matters pertaining to the district are taken up with plaintiff, and that plaintiff is capable of handling the school district affairs (R. 217, 228, 229). Indeed, he must be capable of doing so, for he majored in education in normal schools, and was trained to be a teacher (R. 111).

With respect to his services on the thirty-man law making Council of the Salt River Valley Water Users Association, his own testimony shows that he is the vice-chairman, and until recently was the chairman of the Council, that he attended and presided over regular and special meetings of the Council, and that he made the motor trips to the various dams in the Salt River Valley Water Users Project to inspect the same (R. 191 to 194, 197, 198). According to his witness Freestone, plaintiff has attended most of the Council meetings, and is a capable member of that body (R. 226, 227). The testimony of plaintiff also establishes that in the latter part of 1941, and the early part of 1942, he served on a special labor committee, and went to Washington, D. C., as an accredited representative of the Association to settle tax problems with the government (R. 194, 198 to 200).

The Salt River Valley Water Users Association is an organization of farmers, operating a water and electric system for the supply of irrigation water and power in

central Arizona. The lands served by the Association comprise approximately 250,000 acres. The Association operates five large storage dams, two diversion dams, eight hydroelectric plants, one steam plant, one diesel plant, 1400 miles of canals and laterals, hundreds of miles of power lines, two hundred deep well pumps, and other plants necessary for the operation of a water and electric utility. *Reynolds v. Salt River Valley Water Users Association*, (C.C.A. 9), 143 F.2d 863.

Passing to the evidence with respect to plaintiff's services as the administrator of a decedent's estate, it is to be noted that while he contends that his attorney did all the work, he admits that he duly qualified and served under court appointment, and that he submitted to the probate court a verified account of his services with a request for compensation in excess of the usual administrator's fees, for extraordinary services performed by him in the administration of the estate (R. 184 to 187).

A pretty fair indication of his capacities to manage the agricultural affairs for others is to be found in the fact that, not only does he lease 185 acres of his own land, and executes the leases and arranges for irrigation of such land (R. 124, 138 to 143), but he has handled a forty-acre farm for a nonresident sister, and, in so doing has advertised it for leasing and has arranged to have it cultivated, planted, and cared for, and for the grain raised thereon to be stored and sold (R. 143 to 145, 166, 167).

Plaintiff argues that he did all of the farm work and supervision before he contracted arthritis, and that since that time he has hired others to do it for him. He also argues that his steady income from the farm operations is traceable to increased prices for farm produce. These

arguments are pure assumptions, and are not borne out by his testimony.

Plaintiff concedes that his usual occupation has been that of farming and farm management, as stated in his application for the insurance policy (Br. 7, 31, 40; R. 110, 111), but his brief states:

“Before becoming disabled, the insured gave these farms a most active and efficient management, but since that time he had become less active so that his management was much less efficient” (Br. 31).

Plaintiff concedes that he is better off financially than before he developed arthritis (Br. 20; R. 145, 207), and that:

“The evidence also showed the farm, so being operated, to earn a substantial income” (Br. 34).

These circumstances do not indicate that the management was less efficient. Nor can the increase in income be explained as the result of increased prices, because farm costs had also increased, and plaintiff had acquired more acreage and more livestock.

As far as farm help is concerned, the record doesn't justify any conclusion that conditions have changed materially. Plaintiff's wife is afflicted with rheumatism (R. 152). He has at his farm foreman, and with whom he discusses crop changes (R. 133), the same man who has been working on the farm since before plaintiff developed arthritis, and he has always used help in his dairy operations, even before such have obtained their present magnitude (R. 109, 125; 128 to 131).

It is, no doubt, true, as he has testified, that he avails himself of “custom labor” to till the soil and to harvest

the crops, but, as his witness, Saylor, states, this is customary in farm operations in the Salt River Valley (R. 233, 234).

That plaintiff is the manager and supervisor of his farm operations is clear from the facts that he keeps the farm books and records, and himself makes all of the entries therein (R. 155 to 158), and that he borrows money, signs notes, mortgages and loan applications, and discharges such obligations (R. 138, 163, 164, 167; 181 to 183), and that he pays all of the bills as the same become due, pursuant to statements submitted to him (R. 204). The bills are paid by checks drawn by him (Br. 21), upon two separate bank accounts which he maintains, and wherein he makes all deposits (R. 152). As to his most active bank account, it is interesting to note that he testified, as follows:

"Well, I think on the Valley Bank that at different times there was money deposited over there for me *that I didn't personally make myself. \* \* \**" (R. 159).

These aspects of his operations are close to those of the insured who was held, as a matter of law, not to have been totally disabled, in *Ireland v. Mutual Life Ins. Co., ante*, and which are set out in the opinion, as follows:

"And in this connection, plaintiff, under cross-examination, testified: 'We operate these two farms, you might say, as a partnership, since we file a joint income tax'; that one bank account in his name was kept in the Bank of Mt. Olive; that all deposits were put into that account, and all expenditures were paid by check drawn on that account; and that, in his language, 'I wrote and signed the checks for the farm

and whenever the necessity arose I applied to the bank and borrowed money. My principal duties were to provide funds for the operation of the farm. I have already testified that I did the banking business, looked after the deposits and loans with the Bank of Mt. Olive.' (38 N.E. 2d 208).

Plaintiff's testimony discloses that he has operated his tractor on a few occasions, even as recently as the summer of 1948 (R. 135, 136), and that he has purchased seed, livestock and land (R. 133, 134, 161, 168, 170, 172, 173, 178, 189), and that he has borrowed grain (R. 168, 169), and that he has arranged for servicing and demonstrating his dairy equipment, and for trading old for new equipment (R. 135, 171, 178).

Plaintiff's testimony also reveals that he has done and is doing, continuously, the following things amongst others:

1. Pays taxes on the land (R. 160);
2. Sells the grain raised on the land (R. 148 to 151; 189);
3. Stores seed and grain for future use, and had 1,200 sacks of grain in storage at the time of trial (R. 145, 150);
4. Purchases farm supplies and equipment, and arranges for repairs of machinery (R. 164 to 167; 171; 175 to 181);
5. Hires and pays the farm hands (R. 125, 126, 130);
6. Arranges and pays for irrigating, cultivating and seeding the land. (R. 159, 166, 169, 170; 172 to 174; 176, 179, 188);

7. Arranges and pays for cutting hay, threshing grain, bailing hay, and hauling of grain and hay (R. 136, 137, 161, 162, 165, 166, 168, 170; 175 to 178; 180 to 183);
8. Sells milk to Borden's Creamery, and takes up dairy problems with the creamery. He looks over the monthly statements, accepts checks in the amounts of \$800.00 to \$1,000.00 per month, and deposits such proceeds (R. 145 to 148; 207).

Plaintiff has been able to drive his automobile and his pick-up truck on occasions, and to take day-long motor trips to northern Arizona and to California (R. 104, 131, 132, 191).

Plaintiff's farms, and his sister's farm, and his dairy, and the school board, and the Council of the Salt River Valley Water Users Association didn't run themselves. There is no evidence that others could take credit for such successful, profitable and continuous operation, nor that his own income and profits were derived from invested capital. All of these properties and activities were under his constant supervision, and the only reasonable inference which can be drawn from the evidence is that their success and profits were attributable to his own energies and capabilities while he was conducting, with reasonable continuity and for compensation, gain and profit, his own occupation and other occupations in which he might reasonably be expected to engage, within the test relied upon in his argument (Br. 12).

## CONCLUSION

No evidence nor medical opinion whatsoever was introduced, or even offered at the trial, to show or tending to show that plaintiff was totally and permanently disabled on February 1, 1942. If it be assumed that there was evidence that he was so disabled at the time of trial in October, 1948, such evidence would not tend to show such condition six years earlier, *Light v. Connecticut Gen. Life Ins. Co.*, *ante*. This principle is peculiarly applicable, in view of plaintiff's contention that his arthritis has become progressively worse during the years for which he seeks to obtain total disability benefits.

Plaintiff's unexplained delay for many years before instituting suit, is a circumstance tending to show that he was not totally disabled as contemplated by the policy, *Hicks v. Mutual Life Ins. Co. of New York*, (C.C.A. 4), 83 F.2d 275, c.d. 299 U.S. 563, 57 SC. 25, 81 L.ed. 414, 305 U.S. 564, 59 SC. 54, 83 L.ed. 355; *Deadrich v. United States*, *ante*.

Plaintiff testified that he submitted to defendant as proof of total disability, everything that defendant asked for—nothing else—and did not disclose anything so submitted other than some x-rays which were taken several years earlier (R. 59, 60).

Therefore, plaintiff wholly failed to show that he is entitled to demand total disability benefits under the policy.

Furthermore, plaintiff wholly failed to show that he is entitled to receive total disability benefits under the policy, and the evidence clearly established that, as a matter of law, he is not so entitled.

Plaintiff proved that he is, and has been afflicted with arthritis accompanied with pain. He was not insured by this policy against either condition. He also testified that he is not so physically active as he used to be. He was not insured against such condition.

The undisputed evidence established that, during all of the time for which he seeks to recover total disability benefits, he has followed the very same occupations which he followed before he developed arthritis, and that these are the occupations for which he was trained and educated. It is impossible to conceive what more he could have done, considering his age and position in life, to conduct his usual occupation, or any other suitable occupation, with reasonable continuity and for compensation, gain and profit.

Both the Supreme Court of Arizona and the Ninth Circuit Court of Appeals pay large respect to the judgment of the trial judge, when, after observing the witnesses and noting all matters at the trial which are not capable of record, he concludes that there is no excuse for a verdict save for the defendant, and so rules by such a direction. *Cope v. Southern Pac. Co., ante;* and *Deadrich v. United States, ante.*

The evidence was such that a jury could not properly return a verdict for plaintiff. Had the jury been given the case and returned such a verdict, the same would have been founded wholly upon surmise and conjecture contrary to undisputed facts, and the trial court would have been bound to have set it aside. Therefore, it would have been an idle gesture to so submit the case. For these

reasons, it is respectfully submitted that the judgment for defendant should be affirmed.

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No. 12,202

# United States Court of Appeals

FOR THE NINTH CIRCUIT

---

THOMAS J. HUGHES,

*Appellant,*

VS.

THE MUTUAL LIFE INSURANCE COMPANY  
OF NEW YORK, a corporation,

*Appellee.*

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## APPELLANT'S REPLY BRIEF

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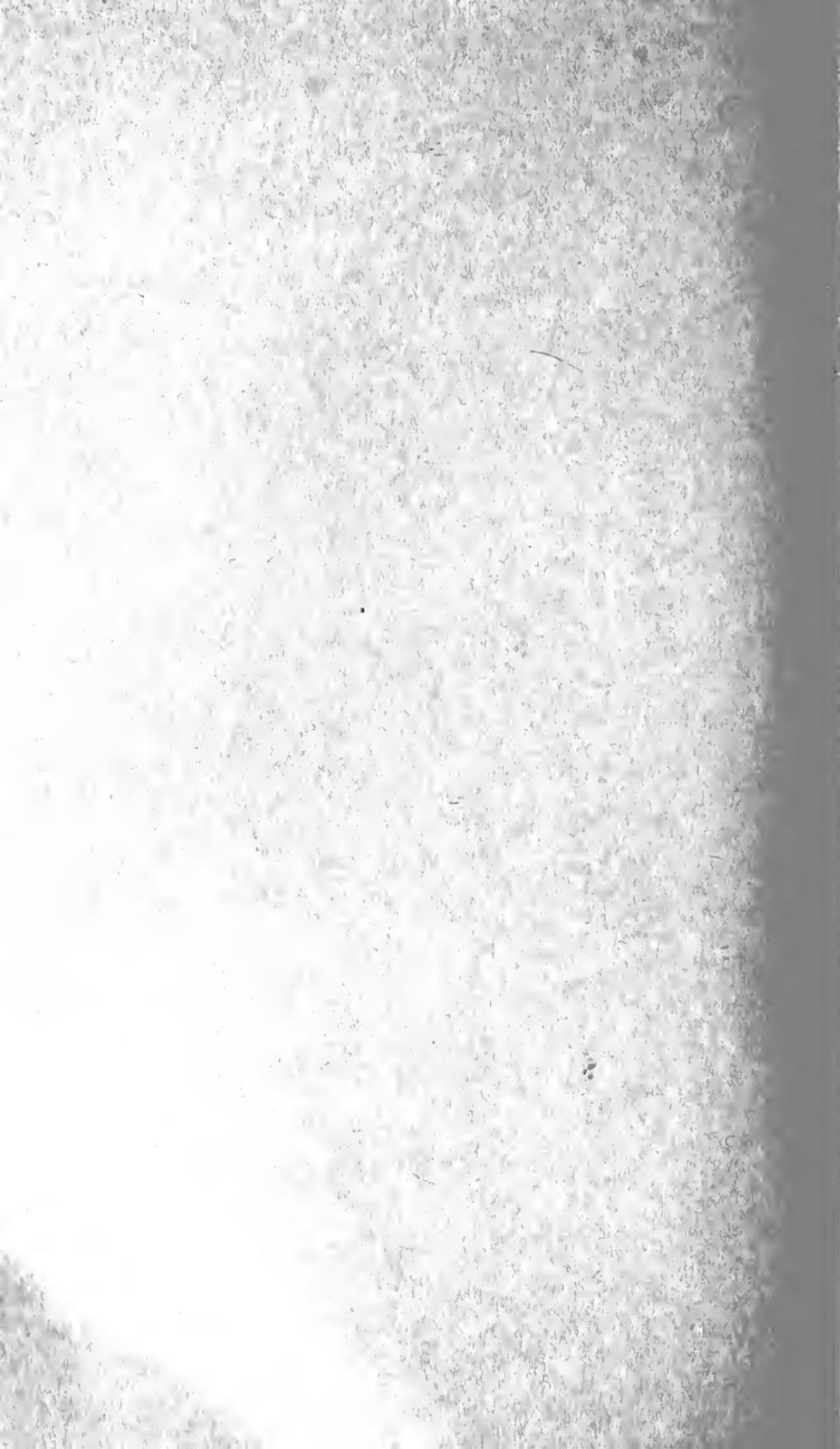
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## **APPELLANT'S REPLY BRIEF**

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In our opening brief we reviewed the evidence in detail, and, we think, thoroughly covered the law applicable to the facts in this case.

Each case of this type must be governed by the facts as shown by the evidence. Since the defendant in its brief claims that the plaintiff himself was supervising, managing and operating his farm and dairy, when in truth he was not, and cites certain cases which



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hold that an insured who does such work is not totally and permanently disabled, we deem it proper to point out the inaccuracy of the defendant's statement of the evidence and the great difference between the activities of the various insureds in the cases so cited by the defendant, and what was done by the plaintiff.

Reference to defendant's brief will be indicated by "Br.", and the transcript of record as "T."

#### **COMMENT ON DEFENDANT'S STATEMENT OF THE CASE.**

The defendant states that according to the plaintiff's physician, the plaintiff was an active man, mentally alert and organically sound (Br. 3). This is an inaccurate statement, for the reason that the testimony of plaintiff's attending physician as a whole shows the plaintiff to be disabled from doing any work. The word "active" is a vague term. If a man is not absolutely helpless in bed, but is able to feed and clothe himself, he can be said to be active, although he cannot do any work. The doctor's testimony was that the plaintiff was so disabled that he could not work and that any attempt to do so was highly injurious. No claim was made during the trial or at any time that the defendant was not sound mentally.

Opposing counsel assert that the plaintiff did various things in connection with his farm and kept his land under cultivation (Br. 3), but they overlook the fact that all this was done by a foreman or farm manager and other workers. The plaintiff, before becoming disabled, supervised the operation of his farm

and dairy and did all kinds of farm work himself with the aid of one hired man (T 109), but after becoming disabled he had to abandon all this to a foreman and others. The plaintiff had no foreman before becoming disabled.

The defendant endeavors to make capital of the fact that the plaintiff had quite a gross income and kept his own books (Br. 4). This fact does not negative total and permanent disability when an insured is so disabled that he cannot perform the substantial and material acts of an occupation. Numerous cases cited in our opening brief uphold this contention, and, in *Erreca v. Western States Life Ins. Co.*, 19 Cal. (2d) 388, 121 P (2d) 689, the Supreme Court of California, after stating that the magnitude of the insured's enterprise and his income therefrom were not to be considered in determining whether or not the insured was totally disabled from performing remunerative work, went on to say, with reference to keeping books of farming operations, as follows:

". . . Secretarial work in connection with farm operations is unimportant." (Last sentence, paragraph numbered 7, page 695, 121 P (2d)).

Comment is made upon the fact that plaintiff acted as administrator of an estate (Br. 4). This matter was covered in our opening brief, but the evidence in this respect is that the attorneys did all the work (T. 208).

Defendant seeks to give great importance to the fact that plaintiff was a member of a rural school board and a member of a water users counsel (Br. 4). These positions were honorary. No compensation was received for being on the school board which met most of the time at plaintiff's home because of his crippled up condition. The water users council met regularly four times a year to pass an occasional by-law. Compensation was \$4.10 per meeting. The council is the law making body and did not have much activity (T. 198). The Board of Governors of the water users association, of which plaintiff was not a member, is the board that administers and runs the association (T. 198).

Plaintiff's trip to Washington, D. C., as pointed out in our opening brief, so adversely affected him that he had to stop in Kansas City where he was very ill and confined to his bed. He did not even leave his compartment while enroute (T. 205-206).

#### **SUBDIVISION 1 OF DEFENDANT'S ARGUMENT DISCUSSED.**

Defendant states that inasmuch as there is no ambiguity in the policy in question, there is no need for construction (Br. 6). The fact remains, however, that the courts have construed the words "totally and permanently disabled" as used in an insurance policy not to mean, as their literal construction would require, a state of absolute helplessness, but to mean inability to perform the substantial and material acts

of an occupation or perform them in the usual and customary manner. Accordingly, there is room for construction. Where words of a contract must be construed, it is the universal rule of law that the words are to be construed most strongly against the one who drew the contract.

*Prudential Insurance Co. of America v. Wolfe*, cited by defendant (Br. 6) is not in point. This was a suit on a group policy that had lapsed sometime before. The undisputed facts were that during the interim the insured was able to and did engage in several occupations for a considerable period of time after ceasing to work in the group covered by the policy.

In *Aronson v. Mutual Life Ins. Co. of New York*, next cited by defendant (Br. 7, 11, 17), the insured had some arthritis and claimed to be disabled, but the undisputed facts showed that the insured was a successful manager of an apartment hotel, that he did a great amount of work, took out a janitor's union card under an assumed name, had his daily routine about his work, and was able to perform it.

In the Washington case of *Cleveland v. Sun Life Insurance Co. of Canada* (Br. 7, 11, 17), the facts are that the insured broker after his claimed disability was able to carry on his business about as well as before. In two and a half months he made an eleven thousand mile automobile trip visiting the various

national parks and other places. He drove a considerable distance each day. He also went hunting, fishing, played golf and went to dances. The evidence in the case at bar shows that Mr. Hughes could not do any of these things. In this Washington case the insured's doctor testified that while insured had hypertropic arthritis of the spine, the condition of the insured was prevalent in seventy-five to ninety percent of men fifty years of age, that the condition had no clinical significance and that only about one percent of persons in the insured's condition have pain. The doctor further testified in that case that in his opinion the insured was not incapacitated from carrying on his duties with a degree of success and was not disabled with any degree from earning wages or profits in some occupation or gainful pursuit. Furthermore, the plaintiff's position in this Washington case has an unsavory odor. At the close of the plaintiff's case, after the doctor had so testified and it was apparent that the plaintiff would lose his case, his counsel prevailed upon the court to permit him to re-open the case. Thereupon, the doctor, who was in the court room and heard the discussion, again took the witness stand and testified that in his opinion the insured was totally and permanently disabled.

The foregoing cases are not in point, for the reason that although the insured claimed to be disabled, the admitted facts and other undisputed evidence disclosed otherwise.

**DEFENDANT'S SUBDIVISION NO. 2 DISCUSSED.**

Opposing counsel seek to criticize plaintiff because, although he cited sixty-nine cases he quoted from only nine (Br. 7). Space would not permit us to quote from all. We quoted from some to illustrate certain points. At the beginning of each subdivision of our brief, where cases were cited, we gave the holdings of the decisions there cited, under the belief that we had a right to assume that the court would want to consult the cases rather than rely on excerpts from them.

Defendant attempts to distinguish the cases involving farmers, cited in our opening brief, from the case at bar by saying that in those cases each farmer was found to be wholly unable to manage his farm and was also found to have abandoned management to others (Br. 8, 9). This is the situation in the case at bar, as the evidence clearly establishes that the plaintiff was so crippled up that he could only take short walks, could not go out into his fields or supervise the operation of his farm, but had to abandon management thereof to a foreman and the farm work to others.

**SUBDIVISION NO. 3 OF DEFENDANT'S BRIEF DISCUSSED.**

Defendant relies greatly on *Ireland v. Mutual Life Insurance Co. of New York* (Br. 10, 17, 24). The insured in this case followed his occupation after the claimed disability about the same as he had before. The insured in this case stated:

“My principal duties were to provide funds for the operation of the farm.” (page 208, second column, 38 S.E. (2d).

After suffering a disability the insured continued to provide these funds in the same manner as before. In addition thereto he continuously drove his automobile and his truck in making numerous trips to another town for the purpose of himself marketing and selling livestock, eggs, tobacco, cotton and other farm products, and in attending sales at stock yards and the tobacco market. He drove his automobile as much as twelve hundred miles in thirty days. He was successfully carrying on an occupation. Opposing counsel in their discussion of the case disclose only a small part of the activities of the insured.

This Ireland case is from North Carolina. We pointed out in our opening brief that the literal or strict construction rule of interpretation of the words “totally and permanently disabled” is no longer sound law. North Carolina is one of the states which has adhered to this literal or strict construction rule. The North Carolina Supreme Court, in *Bullock v. Mutual*

*Life Insurance Co. of New York*, 200 N.C. 642, 158 S.E. 185, said (1st column, page 187 S.E.):

"North Carolina has been classified in the decisions of the various courts as adhering to the strict construction of such contracts." (insurance contracts)

Even this state has held an insured to be totally and permanently disabled when disabled to about the same extent as the plaintiff in the case at bar, as shown by some citations from that state in our opening brief.

*Light v. Conn. General Life Insurance Co.* (Br. 11, 27) is not in point, as the plaintiff in that case was insured under a group policy against disability in the particular occupation of oil field worker. Upon ceasing to work for the oil company his policy was terminated and after successfully farming for some time he attempted to claim that he had therefore become disabled while in the employ of the oil company.

In *Metropolitan Life Insurance Co. v. Alston* (Br. 12, 17) the insured after becoming afflicted with a heart ailment turned over management of his realty interests to a son, but continued to act as chairman of the board and chief executive officer of a bank, and, as stated by the court, he performed his responsible duties in the usual and customary way and received a salary of \$700.00 per month. He had even been promoted and his salary increased. The gist of the court's

ruling is that if an insured is engaged in several occupations and gives up one because of a disability, but is able to carry on another one of them in a customary and efficient manner, he is not totally disabled.

In *Thigpen v. Jefferson Life Insurance Co.* (Br. 12, 17) the insured was able to follow an occupation though not his usual one. The first headnote to this case reads:

“Insured was not wholly disabled within his disability clause of his life insurance policy unless he was prevented from pursuing any occupation for remuneration and profit and not merely the duties of his usual occupation.”

This Thigpen case is also from the strict construction state of North Carolina.

Many courts hold an insured to be totally and permanently disabled if he is unable to perform the duties of his particular occupation, even though he is able to perform the substantial and material acts of some other business or occupation. These cases are annotated in paragraph III, c.l., 149 ALR 40. Also see *Equitable Life Assurance Society v. Bomar*, (CCA 6th) 106 F (2d) 640, and *Deckert v. Western & Southern L. Ins. Co.*, 51 F. Sup. 44.

In *Cobb v. Mutual Life Insurance Co. of New York* (Br. 13, 17) the insured operated his farm with a foreman prior to his claimed disability. A part of the insured's business was racing horses. After the claimed

disability his farm was run in the same manner as before, and the insured continued to attend races and race his horses over a wide territory, driving his automobile for that purpose. His own testimony disclosed that he did perform and had the ability to perform an essential part of his duties.

In *New York Life Ins. Co. v. Howard* (Br. 13, 17) the insured carried on many activities. The court in its opinion said that it did not appear from the evidence in sufficient detail what insured did before becoming disabled. The court further said not only did insured not desist from attending to his farm operations or performing certain duties with reference to his other businesses, but he undertook other duties, service in the General Assembly. The court's decision was not unanimous. The dissenting opinion states that the jury was authorized to find plaintiff totally and permanently disabled.

*Azevedo v. Mutual Life Insurance Co. of New York* (Br. 14) is another case where the evidence showed that while the action of plaintiff's right arm was impaired, he did perform substantial and material acts of his occupation of farming.

These cases cited by defendant illustrate the point that even though an insured claims to be disabled if the admitted facts and other undisputed evidence discloses that he works and is able to work, the court is justified in holding the insured not to be totally and

permanently disabled. The undisputed evidence in the case at bar is that the plaintiff does not work and is not able to work, but merely performs a few trivial tasks such as writing checks.

#### **DEFENDANT'S SUBDIVISION NO. 4 DISCUSSED.**

Defendant claims that what it terms the "common care and prudence doctrine" is not applicable in this case. The undisputed evidence of the plaintiff, his lay witnesses and his doctor, however, is that the plaintiff not only was compelled to desist from working, but even when he attempted to work or drive a tractor, such activities inflamed his joints, caused him to become ill, sick at the stomach and caused him to have to take treatments and go to bed. Dr. J. H. Patterson testified that endeavoring to work irritated the plaintiff's condition, brought on inflammation and was very harmful to him. All this evidence is reviewed in our opening brief.

Defendant's comment on the testimony of Dr. Goss to the effect that hypertropic arthritis is a common condition in men past fifty years of age, many of whom continue to work (Br. 16) does not give a fair picture of the doctor's testimony. What the doctor said was (T. 80) :

"A. They have some form of arthritis. Hypertropic form may not eventuate until later on, but usually men around fifty on up have some form of arthritis."

This doctor, however, further testified: (82)

"Q. Dr. Goss, counsel brought from you that a man past fifty years at times had some arthritis. Is it normal or ordinary for them to have any such arthritis as manifested in these pictures? (of the plaintiff)

"A. I would think not so to such extent as shown here."

Dr. Patterson testified that Mr. Hughes' condition was not normal for a man of his age (87).

Defendant advances the theory that the opinion evidence of a physician to the effect that the insured is totally and permanently disabled is without value when the undisputed evidence shows that the insured is actually pursuing an occupation with reasonable regularity (Br. 17). Any cases so holding are not applicable here, as the undisputed testimony of plaintiff's numerous witnesses other than doctors conclusively discloses that the plaintiff ceased to work in 1935 and has been unable to work since then, and is very badly crippled up.

The defendant seeks to distinguish cases involving persons afflicted with tuberculosis from the case at bar, on the ground that such a disease, as a matter of common knowledge, is seriously aggravated by activity (Br. 15). The evidence in the case at bar discloses that the plaintiff's arthritis is of such a severe nature that activity aggravates his disease and is harmful to him.

Defendant quotes at length from a South Carolina case (Br. 18). The citation is given but the case is not named. It is *Stewart v. Pyramid Life Ins. Co.* This case points out that the only evidence upon which the plaintiff could rely to take the case to the jury was the assertion of the doctor of his opinion that the plaintiff was totally and permanently disabled. The undisputed facts in the case were that the plaintiff was able to work and did continue his work. The court said that in the light of the undisputed facts, the testimony of the doctor had no probative value. In the case at bar, however, there is evidence of many witnesses that the plaintiff did not work and could not work.

In *Deadrich v. U. S.* (Br. 17, 27, 28) the court held that the insured could not recover on the theory that he was totally and permanently disabled at the time of the termination of his policy eleven years before when the admitted facts showed that during the interim the insured was able to follow and did follow several remunerative occupations. The medical testimony in this case was contrary to the admitted facts. To the same effect is *U. S. v. Baker* (Br. 17).

#### **DEFENDANT'S SUBDIVISION NO. 5 DISCUSSED.**

We feel that the capital investment phase of the case was so fully covered in our opening brief that it is unnecessary to reply to the defendant's comment on it. The Errica case and *Hoover v. Mutual Trust Life Ins. Co.*, 225 Iowa 1034, 282 NW 781 also well answer the defendant's argument.

The balance of defendant's brief, which is devoted to a discussion of the plaintiff's activities contains many inaccuracies and greatly magnifies these activities. Defendant infers that plaintiff is running the Salt River Valley Water Users Association, when in fact he is only a member of the council, the function of which is to meet only four times a year to occasionally pass some by-law. The assertion is made that the plaintiff on a few occasions drove a tractor when the evidence discloses that when he attempted to drive one it made him sick. The incident about the tractor in 1948 referred to on page 25 of the brief is the attempt to run one that Roy Painter testified made the defendant ill and he had to go to the house and lie down (T. 215). On the same page, the defendant states that the plaintiff purchased livestock. There is no evidence of any purchase. Plaintiff's herd did increase because it so happens that cows have calves. On cross-examination this testimony was given by plaintiff with reference to his activities with cattle (T. 133) :

Q. Does Manuel Viermontes (the foreman) look after those cows?

A. He looks after the whole ranch, everything."

Defendant attempts to infer that plaintiff as a member of a water users council inspected dams. The evidence is that the council made yearly inspection trips to the dams in buses. The plaintiff had not made any trips for quite a while and when he did make the

trips he was unable to walk around or inspect the dams (T. 193, 204). Defendant states that plaintiff on behalf of a non-resident sister participated in the acquisition and operation of a farm (Br. 20) and that the plaintiff handled a forty acre farm for the sister (Br. 22). This is another exaggeration as the plaintiff did not either acquire or operate the farm. All the plaintiff did was call a man and tell him his sister wanted her land plowed up and then told his foreman to plant grain for his sister, get it ready, have it harvested and deliver it to the mill (T. 143-144). This could have been done by a bedridden invalid.

Defendant on page 23 of its brief quotes a part of a paragraph taken from page 31 of our opening brief, and claims that it is an adverse admission of the plaintiff. The quotation referred to is our recital of what the court said the facts were in the case of *Mutual Life Ins. Company of New York v. Dowdle* and has nothing to do with the plaintiff's activities in this case.

Defendant's comment on what is shown by the evidence contains many other distortions, inaccuracies and exaggerations, but space will not permit us to point out all of them. In speaking of the plaintiff's farming operations the defendant assumes that the plaintiff himself has been carrying on these operations when in fact he has not, but has had to abandon them to a foreman.

Defendant is critical because suit was not brought for nearly six years after the first default (Br. 27). Upon the company's default the plaintiff consulted counsel (T. 53). Plaintiff, a man of some means, did not require the benefit payments for his immediate needs. This type of litigation is expensive and especially so where medical testimony is required. An action soon after default would not have determined plaintiff's future disability or rights. Successive suits would have to be brought. Advising plaintiff to wait until the amount involved was worth a law suit was reasonable advice. Arizona has a six year statute of limitations on written contracts (Section 29-205 Arizona Code 1939). During the period in question, defendant was informed that its position would be contested by the letters of protest accompanying premium payments (T. 65-66, 101).

#### **COMMENT ON DEFENDANT'S CONCLUSION.**

In conclusion counsel for defendant make the statement that no evidence nor medical opinion whatsoever was introduced or even offered to show or tending to show that plaintiff was totally and permanently disabled on February 1, 1942 (Br. 27). This statement is another highly inaccurate one.

The plaintiff's lay witnesses testified that ever since about the year 1935 plaintiff had not worked, had been crippled up and unable to work (T. 212-220, 223-227, 220-222, 230-235, 236-238, 227-230).

Furthermore, X-rays taken in 1935, 1938 and 1948 were introduced in evidence which show the severity of the plaintiff's arthritic and crippled up condition ever since the year 1935. The testimony of Dr. J. H. Patterson (T. 82-101) who had been plaintiff's attending physician ever since 1935 is that the plaintiff was badly crippled up in the year 1935 and unable to work ever since that time, and that his condition had gotten progressively worse up to the time of the trial (T. 87, 91, 94).

The undisputed evidence is that the plaintiff in the year 1935 made satisfactory proof of his total and permanent disability; that the company thereupon commenced awarding him the benefits provided in his policy and that the plaintiff ever since 1935 has gotten progressively worse.

A fair picture to be drawn from the evidence as a whole is that prior to becoming disabled in 1935 the plaintiff was a very active man who not only supervised and managed his farming interests, but did all kinds of farm labor himself; that since becoming disabled he has had to turn over the supervision and management to a foreman and the farm work to others; that prior to becoming disabled the plaintiff was a hard working man; that he is an ambitious man who hates to give up and be absolutely helpless, and that accordingly he keeps as active as possible and clings to his honorary positions on the council of the water users association and school board which requires almost no effort. On the school board there is

not much for Mr. Hughes to do, although he is consulted on matters of policy (T. 229). The school has a bookkeeper who, together with the principal, make up the budget. The principal hires the teachers (T. 228).

The plaintiff as shown by the undisputed evidence is unable to do any work at all other than perform a few trivial tasks, is unable to perform the substantial and material acts of any occupation, or perform them in the usual or customary manner, and is unable to work with reasonable continuity at any gainful employment at all.

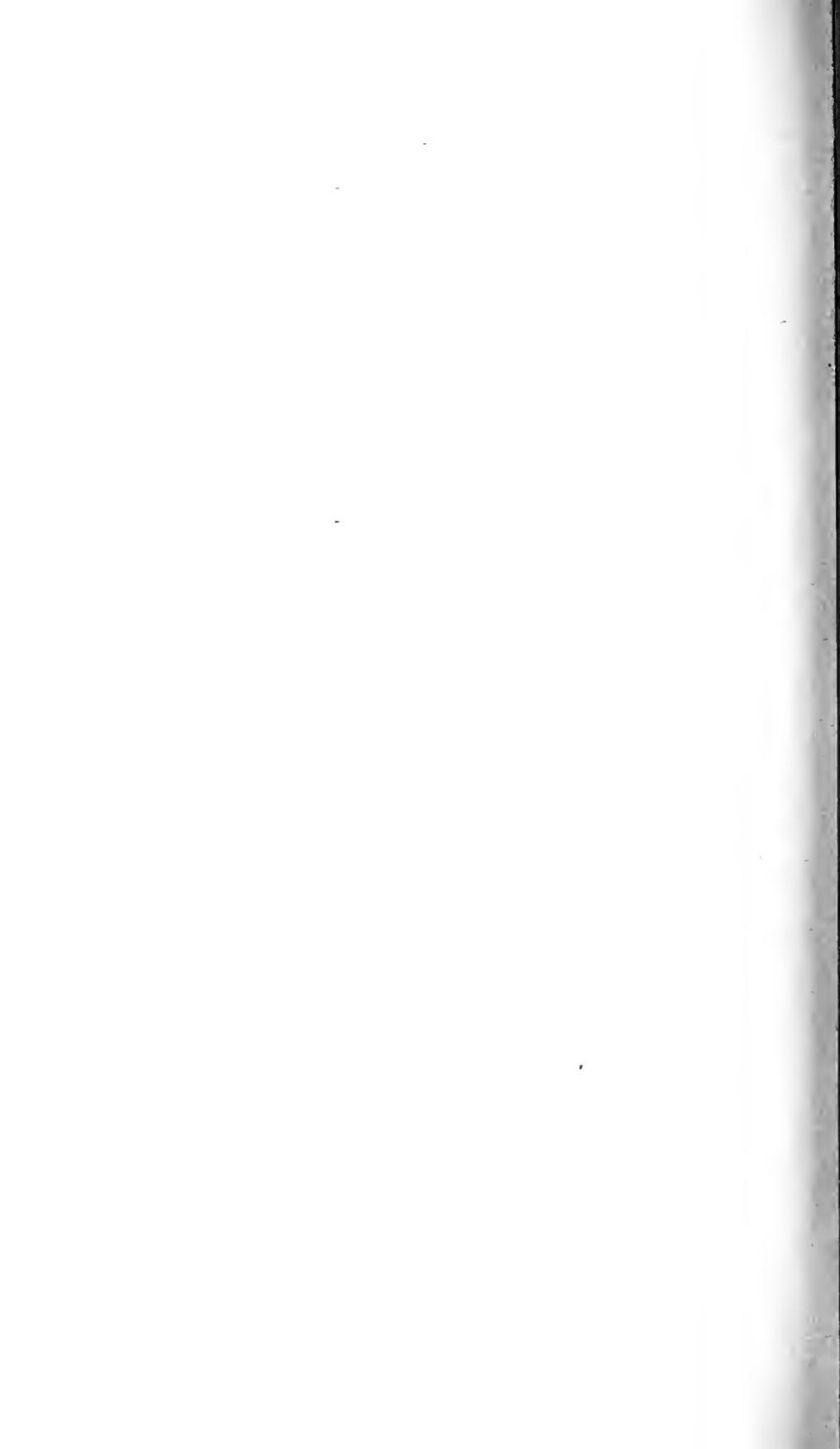
Respectfully submitted,

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No. 12204.  
IN THE  
**United States Court of Appeals**  
FOR THE NINTH CIRCUIT

---

WALTER FIELDS and ADEL C. SMITH,

*Appellants,*

*vs.*

HARRIET V. FIELDS,

*Appellee*

---

BRIEF FOR APPELLANTS, WALTER FIELDS  
AND ADEL C. SMITH.

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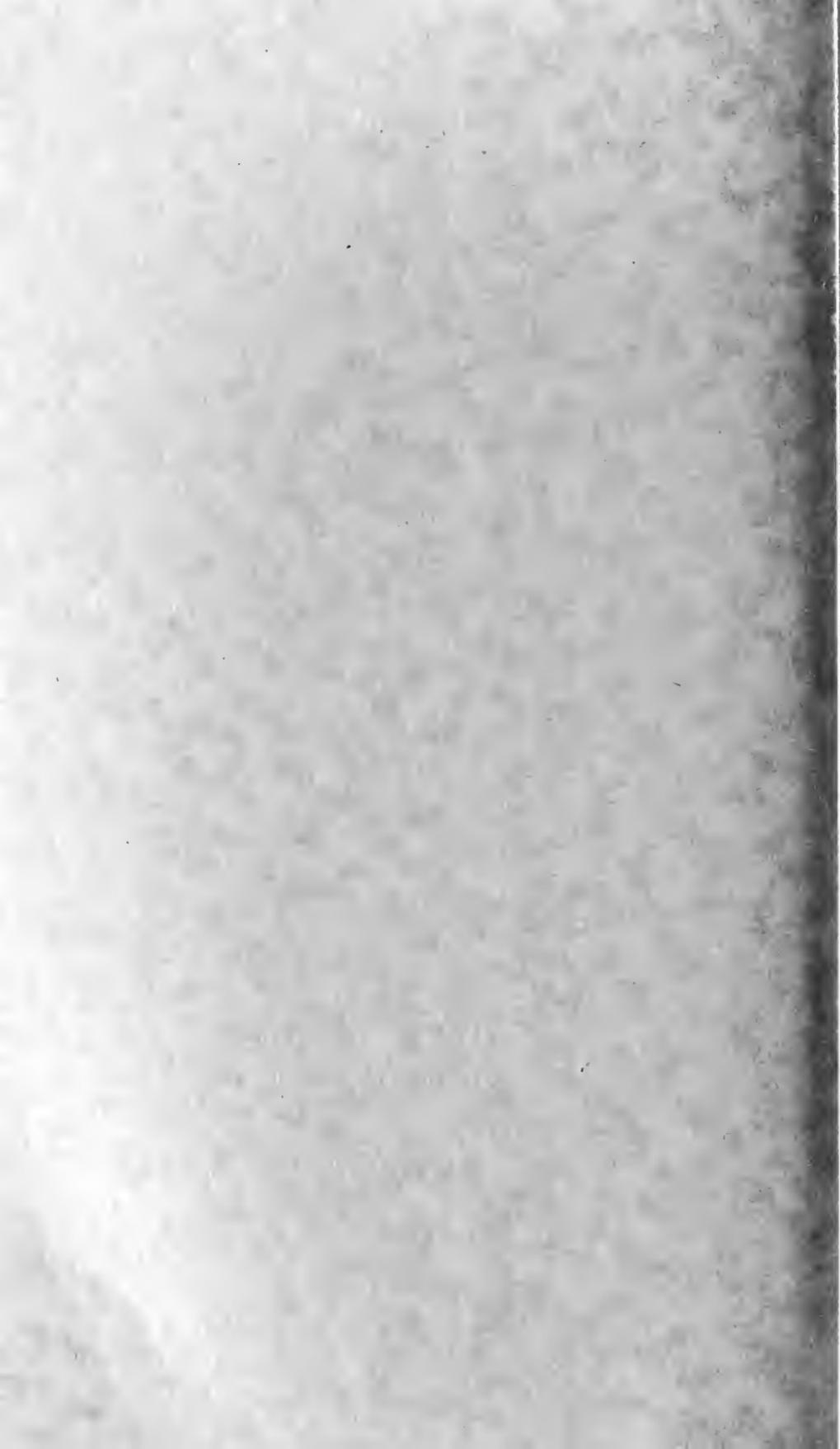
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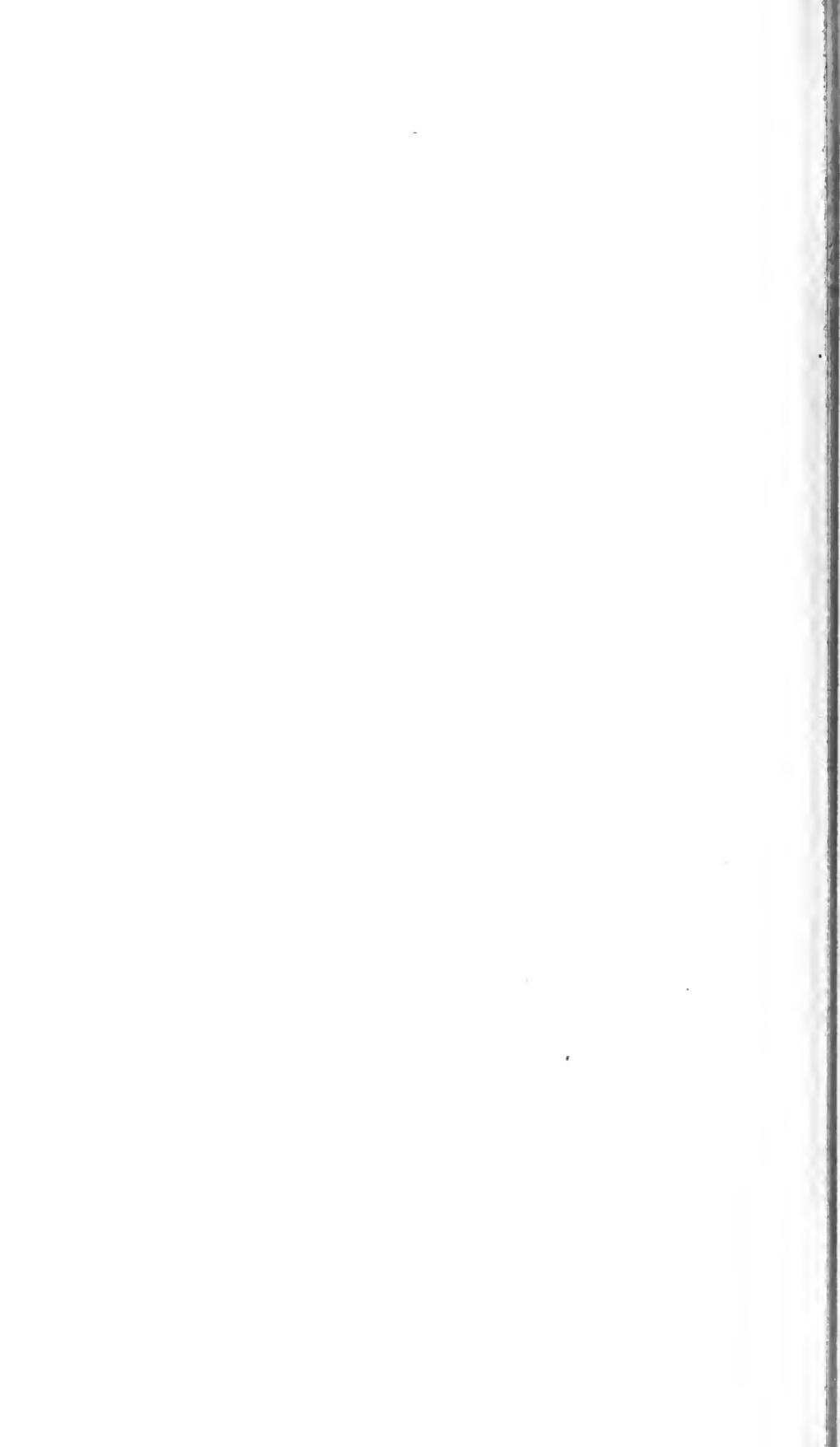
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No. 12204.

IN THE

# United States Court of Appeals FOR THE NINTH CIRCUIT

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WALTER FIELDS and ADEL C. SMITH,

*Appellants,*

*vs.*

HARRIET V. FIELDS,

*Appellee*

---

## BRIEF FOR APPELLANTS, WALTER FIELDS AND ADEL C. SMITH.

---

### Opinions of Court Below.

The Court rendered a written opinion, and later a written supplemental opinion. Both are found in 81 Fed. Spp., pages 54-62. They are also found on pages 24 ad 52 of Clerk's Transcript.

### Jurisdiction.

This is an action in interpleader. Federal jurisdiction rested upon the diversity of citizenship of the parties. Judicial Code, Sec. 24; 28 U. S. C. A., Sec. 41.

### Law Involved.

The laws of New York governing separation agreements between husband and wife domiciled therein. The due process and equal protection provisions of the Fourteenth Amendment of the Constitution of the United States, and Sections 158 and 159 of the Civil Code of California, relating to the acquisition of community property. Also the relinquishment of such property rights under the laws of California and New York.

### Questions Presented.

1. Was the premium on the life policy in question paid by William C. Fields from the community earnings of himself and Harriet V. Fields, his wife?
2. Whether a separation agreement made and fully executed under the laws of the State of New York, a common law state, prevents the acquisition of a community property right by the wife in the husband's earnings during the life of such contract.
3. Whether under the facts and circumstances shown in the record a relinquishment on the part of the wife to any community property claim she might otherwise have had was made by her prior to the payment of the premium on the life policy in suit.

### Statement.

On December 15, 1947, Penn Mutual Life Insurance Company filed its complaint in interpleader herein against appellant and appellee. [Clk. Tr. p. 21.] This complaint was sustained by the Court and the balance on hand of the proceeds of an annuity and death benefit policy on the life of William C. Fields, amounting to \$12,882.32 was paid into the registry of the Court. Appellants were named as beneficiaries in said policy and theretofore had received approximately one-half the death benefits payable under it.

Both appellants and appellee filed answers to the interpleader action, claiming said sum so paid into the Court as above set forth. Appellants contend that the premium of said policy was paid from the separate property, and appellee contends that it was paid from the community earnings of her and the decedent. [Clk. Tr. pp. 10 and 18.]

The policy in suit was a single premium policy of \$26,500.00 and was dated March 8, 1934. The payment of the premium was paid in full on said date. The cause was tried on September 21-23, inclusive, 1948, and the supplementary hearing was held on November 22, 1948. [Rep. Tr. Supp. p. 4.] The Court made findings of fact and conclusions of law. So far as this appeal is concerned only two of the findings of fact need be mentioned. They are as follows [Clk. Tr. p. 58]:

“V.

“It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields.

“VI.

“It is true that the payment of the sum of \$26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift of the community property of William Claude Fields and Harriet V. Fields.”

Judgment passed for appellee for all of said monies, pursuant to these findings. [Clk. Tr. p. 59.]

Walter Fields and Adel C. Smith appealed from the whole of said judgment. [Clk. Tr. p. 61.]

The sole question involved here is the character of the earnings of William C. Fields, from which this policy premium was paid.

William C. Fields died testate in the County of Los Angeles, State of California, on the 25th day of December, 1946. The decedent and appellee had not lived to-

gether as man and wife, but had lived separately and apart since some unestablished date in the year 1907. [Rep. Tr. p. 6; Rep. Tr. Supp. p. 24.] William C. Fields claimed Philadelphia as his home prior to the year 1925. [Rep. Tr. pp. 118, 119.] He claimed Waterford Works, New Jersey, as his domicile from 1925 until he removed to California. When he established a domicile in California is a matter of considerable doubt. His tax returns, copies of which are Exhibits 8 to 31, Reporter's Transcript pages 143 to 182, contain the New Jersey address above mentioned as his domicile, until the tax return for the year 1937 was made, and in this return he specified California as his domicile. [Ex. 27, Rep. Tr. p. 181.] There was considerable evidence which conflicted with these tax returns and this evidence was held sufficient to overcome the statements made therein. The finding of the Court was that on March 8, 1934, and also when these funds were earned to purchase said life policy, the decedent was domiciled in California. We, on this appeal, realize that this Court would probably not disturb this finding of the trial court. [Clk. Tr. p. 57.] William C. Fields, and appellee, though living separate and apart for nearly 40 years, were never divorced. To determine the character of the funds used to purchase this policy, it is necessary to review the salient facts occurring during the period from the separation in 1907 until the death of the decedent on December 25, 1946.

William C. Fields, while a resident of Pennsylvania, intermarried with Harriet V. Hughes, a resident of New

York, in San Francisco on the 8th day of April 1900. [Rep. Tr. pp. 5, 6, 7.] They established a domicile soon thereafter in the State of New York. A son was born to them there in the year 1904. [Rep. Tr. p. 7.] They separated there in 1907, the exact date not being established. Appellee is vague and non-communicative as to the details occurring at the time of their separation. [Rep. Tr. p. 6; Rep. Tr. Supp. p. 23.] Suffice it to say that marital relations were never thereafter resumed. Some years after decedent established his domicile in California, the appellee also removed to this state [Rep. Tr. p. 8], but marital relations were never resumed in California, and each maintained a separate place of abode. [Rep. Tr. p. 215.]

The obligation of William C. Fields to support appellee was reduced to agreements, which were in some instances varied, sometimes up and sometimes down, but consisted of weekly payments made to her which she accepted as and for full payment of her claim for support. [Rep. Tr. Supp. pp. 29, 37, 39.] These facts were established by admission of appellee [Rep. Tr. p. 221; Rep. Tr. Supp. pp. 22 to 44] and also by a large number of letters, which were produced at the supplementary hearing and the digest thereof introduced in evidence. [Clk. Tr. p. 68.] The arrangement for support was made in New York and each and every payment thereof was made in New York either by the decedent personally, or by a New York bank acting as his agent. [Clk. Tr. p. 68.] For example, on

February 25, 1926, appellee wrote him this [Clk. Tr. p. 70]:

“Thank you for the cheque for \$65.00 (sixty five dollars) this week. Undoubtedly you made a mistake in sending \$5.00 too much—however it will keep until next week.”

On or about June 4, 1927, the decedent made arrangements with the Harriman Bank in New York to pay her \$75.00 per week, concerning which she stated [Clk. Tr. p. 70]:

“it is agreeable to me and satisfactory.”

This continued some 6 or more years and was changed to the Guaranty Trust Company of New York on or about March 28, 1933. [Clk. Tr. p. 71.] This continued until his death on December 25, 1946, a period of 13 years at this bank. These payments were for \$60.00 per week, except a slight variation on one or two occasions. These payments continued after both parties had removed to California, the bank arrangements were not in anywise altered. Appellee admits he supported her throughout the period remaining of his life. [Rep. Tr. Supp. p. 39.] An examination of appellee's testimony [Rep. Tr. Supp. pp. 22-45] confirms unmistakably the existence of a New York contract that was religiously fulfilled and performed by William C. Fields from the year 1907 to the date of his death. Finally, the terms of the contract were restated between them in 1938, when she made him a proposition to which he assented. [Rep. Tr. Supp. pp. 39-41.]

### Motion to Reopen Cause.

In addition to the above and foregoing statement, appellants' attorney, John W. Preston, filed herein an affidavit in support of the motion to reopen the cause. [Clk. Tr. p. 48.] The facts set forth in the affidavit were discussed by the Court in its supplemental written opinion. [Clk. Tr. pp. 52, 54, 55.] Whether the Court considered them a part of the testimony in the main cause is not certain, but he characterized them as of no value to the inquiry. (81 Fed. Supp. p. 62.) These facts were statements by the tax agent and by the attorney of Mr. Fields that he said he had a property settlement agreement with his wife, that it was \$60.00 per week, and was to continue for the period of the natural life of Harriet V. Fields. These statements are in exact accord with the letters from him to her under the date of January 13, 1944, in which he stated that he had paid her, "60 smackers per week" year in and year out for 40 years (\$124,800.00). [Clk. Tr. p. 73.]

We shall insist that the hearsay rule has this exception, to wit: where intent behind an act is important, declarations of a decedent are admissible in evidence. His lips are here sealed and she occupies a point of great advantage if these declarations may not be received.

### Specification of Errors.

Appellants will rely upon this appeal upon the following specifications of error, to wit:

“3. The District Court erred in holding that the funds used by decedent, William C. Fields, in the purchase of the single payment insurance policy involved in this case were community property.

“4. The District Court erred in holding that defendant, Hattie V. Fields, did not enter into a property settlement agreement with the decedent, William C. Fields, whereby she accepted payment of monthly sums for life in lieu of any claim or interest in the earnings and property of the said William C. Fields.

“5. The District Court erred in holding that Hattie V. Fields had, or has, any interest, community or otherwise, in the proceeds of said insurance policy.

“6. The District Court erred in holding that decedent, William C. Fields, while domiciled in the State of New Jersey, could not lawfully make a gift of the proceeds of the life insurance policy involved herein to his brother and sister, Walter Fields and Adel C. Smith, without the consent of his wife, Hattie V. Fields.”

## Summary of Argument.

### I.

Appellants insist that on separation in New York appellee's sole right under New York law was support from his earnings.

Her common law dower right and any other special rights conferred on her after the death of William C. Fields would still exist, but her right during his lifetime in his earnings and personal property is settled by the fulfillment of his obligation to support her. In this case the obligation to support her was reduced to a mutual agreement made in New York and religiously performed in such state until the day of his death. This being true, no other right in his earnings existed during his lifetime.

On his death she has only the rights if a widow under the law of succession and other special statutes in California. During his lifetime she did not and could not have any existing community property right.

The change of domicile to California in the absence of a resumption of marital relations therein makes no change in the applicable laws of New York.

### II.

Moreover, under the provisions of Civil Code of California, Sections 158, 159, coupled with the agreement above mentioned together with the conduct of the parties shows a relinquishment of her claim to the earnings of William C. Fields.

### III.

Finally, if the evidence taken on the supplementary hearing is not to be considered evidence on the merits, then we shall contend that an abuse of discretion exists warranting a reversal of the judgment.

## AUTHORITIES.

The Validity and Construction of the Contract Between Mr. and Mrs. Fields Are to Be Governed by the Laws of New York; but the Laws of California Control With Respect to the Remedy.

It is well settled rule of law that, as stated in 41 C. J. S. 595:

“. . . the validity of a contract between husband and wife generally is governed by the law of the place where the contract was made; and matters relating to the remedy sought are governed by the law of the forum . . .”

And it is also well settled that:

“The law governing the contractual relations between husband and wife is the law in force at the time of the alleged contract.” (*Id.*, p. 596.)

See, also, “Conflict of Laws,” Section 4, in 15 C. J. S. p. 858, where the text states:

“In accord with the general rule as to the enforceability of foreign law and subject to the same exceptions, it is usually held that a contract valid under its governing law, discussed *infra* section 11, is considered valid everywhere, and will be enforced everywhere, unless the enforcement of the contract would violate the positive law or unless the enforcement of the contract would violate the settled public policy of the forum, or unless it would work an injury to the state or its citizens.”

This was held to be the rule in California, in *Mercantile Acceptance Co. v. Frank*, 203 Cal. 483, and *Hutchinson v. Hutchinson*, 48 Cal. App. 2d 12, even though the law

of the forum, if applied, would have determined otherwise. See, also, *Griffin v. McCoach*, 313 U. S. 498, 61 S. Ct. 1023, 85 L. Ed. 1481, as among the later cases applying the rule.

In *Estate of Belknap*, 66 Cal. App. 2d 644, the Court held that a property settlement agreement, executed prior to divorce of the parties and providing that the husband would pay to the wife certain sums monthly for her life, was valid and enforceable against his estate, since by virtue of the agreement she was immediately vested with equitable title to the property interest therein provided for.

In effect, the same holding was made in *Higgins v. Higgins*, 121 Cal. 487. There, the parties entered into a separation agreement, providing an annuity to the wife for life, the same to constitute a lien upon the husband's estate. The agreement was held valid and enforceable against lands of the husband, although the locality of same had not been indicated, or specifically described, on the principle that "that is certain which is capable of being made certain."

More in point is the decision in *Alexander v. Alexander*, 158 F. 2d 429. Husband and wife entered into a separation and property settlement agreement in Missouri, which was to be performed in that state. Divorce action was filed in Missouri by, and divorce was granted to, the wife. The ex-husband remarried and moved to Texas, where half of the earnings of a husband belong to his wife. Under the property settlement agreement, the ex-husband was to pay his former wife 20% of his gross income in excess of \$7,500.00 per year, as further support and maintenance money. The question arose as to whether the laws of

Missouri or the laws of Texas were applicable. The Court said, at page 430:

“Our problem, then, is to ascertain the sense in which the parties used this term in their contract. To do this, it is necessary not only to consider the subject matter of the contract, but also the place of its execution, because the place where a contract is executed ‘governs its nature, validity, and interpretation, unless it appears that the parties, when entering into the contract, intended to be bound by the law of some other place.’ *Gossard v. Gossard*, 10 Cir., 149 F. 2d 111, 112. Admittedly, this is a Missouri contract. The parties lived in Missouri, the contract was executed in Missouri, and was to be performed there. It follows that the contract is to be interpreted under the Misosuri law.”

The doctrine in the *Alexander* case is recognized in *Hammond v. Hammond*, 131 F. 2d 351, where the Court held that the construction of a separation agreement made in New York was governed by the laws of New York.

This *Alexander* case is of much further value to this inquiry. The husband after the separation agreement and the divorce removed and settled in the community property state of Texas. Under his contract with his former wife, he was to pay her twenty per cent (20%) of the excess over \$7,500.00 per annum on his earnings. He claimed that under the law of Texas his new wife owned half his income, hence there was no excess. The Court denied this claim and the former wife's percentage was allowed on all and not half his income.

The principle underlying this case is the same as the case before the Court. There the husband tried to vary the contract made in Missouri by coming to Texas, and

here Hattie Fields tries to change the New York contract to a California obligation because he moved to California while the said contract was still in force.

The foregoing authorities show that separation and property settlement contracts are within the scope of the general rule laid down in 41 C. J. S. 595, and in 15 C. J. S. 858, *supra*, and constitute no exceptions thereto. In view of the principles announced, what is the law of New York?

It is the law of New York that a married woman has all rights in respect to property, real and personal and acquisition, use, enjoyment and disposition thereof, and to make contracts in respect thereto with any person, including her husband, as if she were unmarried. (*D. R. L.*, Sec. 51.) Her property is not subject to his disposal or liable for his debts. (*Id.*, Sec. 50.) The husband has the legal duty to support his wife. The wife may sue in her own right for her wages, earnings, compensation, etc., whether from another, or accruing from her own business. Husband and wife may contract with each other, and convey to each other, real property without the intervention of a trustee. The community property system does not obtain in New York. (*Martindale, N. Y. Digest*.) Except in the respects mentioned, it appears that the common law governs the rights and duties of the spouses. By the common law it is the duty of the husband to support the wife, unless she deserts him, and this appears to constitute her sole right in and to his earnings and personal property. (Dower rights are not involved, hence not included in this discussion.)

From the foregoing, it is apparent that, in New York, husband and wife may freely contract with each other in

respect to the property and earnings of either, or both, if any. This would appear to include relinquishment by either to the other of rights in such property and earnings, as one phase of the right to so contract. This general conclusion is fortified by at least two decisions of the New York Court of Appeals. (*Young v. Hicks*, 92 N. Y. 235, and *In re Burridge's Estate*, 261 N. Y. 225, 185 N. E. 81.)

In the case last cited, *supra*, the Court said in respect to a separation agreement in which provision was made for the support of the wife in lieu of her right to claim personal property from his estate, at pages 81, 82 (185 N. E.):

“The parties here have not only agreed to live apart, but have determined the manner in which the husband shall meet his obligation to support his wife, and in return the wife has accepted the stipulated provision for her support in lieu of ‘all other claim and provision for her support’ as well as in lieu of her dower right. Nevertheless the obligation to support in some form continued during the husband’s life, and the family bond was not entirely severed so long as mutual rights and obligations continued. The courts of this state have uniformly held that husband and wife constitute a family so long as the marital rights and obligations continue, regardless of agreement, express or implied, between the parties, as to the manner in which those obligations shall be performed.

“The question remains whether the wife has voluntarily relinquished her right to claim the exemption.

We have held that a wife may do so effectually where she accepts other provision for her support in lieu of her right to claim personal property from his estate. *Matter of Young v. Hicks*, 92 N. Y. 235. Marital rights and obligations end with the life of either party to the marriage, but the state may still determine the division of their property after death. An agreement of a wife that she shall accept in lieu of other provision for her support a sum fixed by agreement, to be paid while both parties live and the husband's obligation to support continues, is fairly open to the construction that the wife still intends to retain such rights against the husband's estate after his death as the law has conferred upon her. The situation is different where provision for support of the wife, to continue after the husband's obligation to support is at an end, and to be paid after the husband's death out of his estate, is accepted in lieu of all other claim or provision for the support. Then the stipulated provision for the support of the wife from her husband's estate takes the place of the provision to which under the law of the state the wife would otherwise be entitled. Other construction of the language of the contract would be forced and unreasonable. Cf. *Matter of Young v. Hicks, supra*; *Girard v. Girard*, 29 N. M. 189, 221 P. 801, 35 A. L. R. 1493. The contract contemplates and provides for that situation after the husband's death, and should be construed accordingly."

The case of *Young v. Hicks*, 92 N. Y. 235, cited in *In re Burridge's Estate, supra*, involved an antenuptial agree-

ment, which provided that if, after marriage, the husband died first, the wife would accept \$1500.00 "in full satisfaction of her dower in his estate," and the husband agreed to provide in his will for the payment of said sum "in lieu of dower, or her rights as his widow in his estate." After the husband's death the widow made claim to certain specific articles of property that, under the law, would be set apart to the family. But, the Court "held that the agreement was and remained in full force after marriage (*Laws of 1849*, Chap. 375, Sec. 3); that the intent was that the woman should take nothing as widow from her husband's estate; and that, therefore, there being no children living, the issue of such marriage, she was not entitled to the specific articles given by statute (2 R. S. 83, Sec. 9) to a widow; that, although not to be appraised, they were part of the estate, and she, by her agreement, was estopped from claiming them." (Syl. 1.)

From the above New York holdings we deduce the conclusion that a satisfaction of the wife's claim for support, without some further special covenant on her part, would not on the husband's demise affect her status as an heir at law to a share in his estate. But the character of his earnings during his lifetime is not changed from separate to community property wherever his domicile. She would have only the right of a widow in his separate estate under the law of succession in the state of his domicile.

The Fourteenth Amendment of the Constitution of the United States Protects the Estate of William C. Fields Against the Community Property Claim of Hattie Fields.

The earnings of William C. Fields were his separate property when residing in New York, when residing in Pennsylvania and when residing in New Jersey. This right was unrestricted except for the duty to support Hattie Fields therefrom. This duty on his part was reduced to a concrete form of agreement between them. So long as his covenants under the contract were kept and performed by him, these earnings remained his separate property. He performed the covenants on his part until death, and, therefore, his earnings remained his separate estate. Change of domicile to California neither relieved him of the burdens, nor withdrew the benefits of the New York agreement.

For approximately 20 years prior to the death of the decedent, he performed his part of the agreement through two banks in New York City, the Harriman Bank and Trust Company and the Guaranty Trust Company. The latter continuously from the year 1933 until the date of his death. The contract was thus made and performed throughout the life of the decedent in New York. The duty of William C. Fields to support Hattie Fields thus rested upon a New York contract. The effect of the performance of this contract on his part was to satisfy all rights of the wife in his future earnings. The fact that

he became a resident of California and died here does not alter the situation. The principle governing this situation is announced in the following cases

*Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.* 292 U. S. 143;

*Home Insurance Co. v. Dick*, 281 U. S. 397.

Therefore, California is without power under the due process provision of the Fourteenth Amendment to change the effect of the terms of this agreement.

In California the Spouses May Freely Contract With Each Other in Respect to Their Earnings and Personal Property Whether the Same Be Separate or Community Property.

*Civil Code*, Secs. 158, 159.

The cases so holding are too numerous for citation. Moreover, the rule is too well established to need citation of authority.

The right of the spouses to contract with each other extends to and includes a written agreement, or an executed oral agreement, transmuting the character of the property held by them, and such an agreement will be given effect by law.

*Yoakam v. Kingery*, 126 Cal. 30;

*Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712;

*Kenney v. Kenney*, 220 Cal. 134;

*Siberell v. Siberell*, 214 Cal. 767;

*Thomas v. Hoffman*, 122 Cal. App. 213;

*Estate of Sill*, 121 Cal. App. 202;  
*Estate of Wahlefeld*, 105 Cal. App. 770;  
*Estate of Henderson*, 128 Cal. App. 397;  
*Schipper v. Penkalski*, 46 Cal. App. 2d 28.

The rule is stated in *Siberell v. Siberell*, 214 Cal. 767, at page 770, as follows:

“Under sections 158 and 159 of the Civil Code, it is now well settled that husband and wife may, as between themselves, enter into any contract respecting property which either might, if unmarried. Under this plenary authority, the separate property of each may be converted into community property and the community property of both may likewise be converted into separate property of both or either. (Perkins v. Sunset Tel. etc. Co., 155 Cal. 712, 719, 720 (103 Pac. 190), and cases there cited.)”

In *Schipper v. Penkalski*, 46 Cal. App. 2d 28, the Court said, at page 32:

“Husband and wife may, by a written agreement or by an executed oral agreement, transmute the character of the property held by them and such agreement will be given effect by law. (Citing cases.)”

The rule is stated broadly in many California cases, including those cases cited, *supra*, and would seem to include any form of property, other than real property, in an oral contract between the spouses, and especially where, as here, such contract is fully executed.

**Either Spouse May Release or Relinquish His or Her Rights and Claims to the Earnings and Personal Property of the Other, and Such Relinquishment May Be Established by Circumstantial Evidence.**

The case of *O'Bryan v. Commissioners of Internal Revenue*, 148 F. 2d 456, seems much in point here, and deserves special consideration. It considers a separation agreement made after the community property right had arisen, although husband and wife separated while living in New York, he removed to California in 1932, and the separation agreement was made in 1935 or 1936 thereafter.

The pertinent provisions of the agreement were as follows (148 F. 2d 456, at 458)

“The parties shall live separate and apart and each be free from interference, authority and control by the other as fully as if he or she were sole and unmarried, and each may conduct, carry on and engage in any employment, business or trade which to him or her shall seem advisable for his or her own, sole or separate use and benefit without and free from any control, restraint or interference, direct or indirect, by the other party in all respects as if each were unmarried.”

The contract differs in legal effect but little from the case at bar. It does not pretend to dispose of existing community property. It only serves to affect the character of the future earnings of the husband. This Court holds that the husband's earnings in California are his separate property. The Court treated it as a California contract under Civil Code Sections 158, 159. How much stronger must be a case where the agreement is executed in a common law state where support is the only right of

a wife in such state. In other words, the contract here satisfies fully the law of the state where executed. A vested right in all his own future earnings arose immediately on the execution of such contract. That is true even if it was no more than a crystalization or implementation of her right to support. If the husband moves into a community property state the character of his earnings does not and could not lawfully change. The Fourteenth Amendment of the Constitution of the United States guarantees him equal protection with all other citizens in his property rights. See also:

*Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, 719;

*Estate of Patterson*, 46 Cal. App. 415, 421.

These two cases directly decide that relinquishment may be shown by circumstances. Many other California cases, by necessary implication, or by analogy, hold to the same effect. Indeed, it would be a departure from the general rule applicable to implied contracts to hold otherwise.

In *Perkins v. Sunset Tel. & Tel. Co.*, 155 Cal. 712, *supra*, the Court said at pages 719, 720:

“Under our law there can be no doubt that a husband and wife may enter into a contract with respect to their property, whereby one may release to the other all interest, *both present and in expectancy*. (Citing numerous cases.) It will be seen by an examination of the authorities cited above that the utmost freedom of contract exists in California between husband and wife and that *the courts will resort to circumstantial evidence furnished by the general conduct of the spouses with reference to their property in determining the existence or non-existence of a*

*contract where the exact terms of the alleged agreement have escaped the memory of one or both of the parties to it.* In the case at bar there was both positive evidence and also testimony as to facts and circumstances tending to show that the contract, whereby the husband remitted to his wife all his interest in that which would ordinarily have been the community property, was, and had been in existence for a long period of years.” (Italics ours.)

The above quoted language was quoted with approval in *Estate of Patterson*, 46 Cal. App. 415, at page 421, the Court emphasizing that part of the holding in the *Perkins* case, “*that the courts will resort to circumstantial evidence furnished by the general conduct of the spouses,*” etc. (Italics the Court’s.)

The separation and the conduct of Mr. and Mrs. Fields, over a period of almost forty years, are strong circumstances showing that some kind of an agreement existed between them in respect to his earnings, and personal property acquired therewith, and likewise that her acceptance of \$60.00 per week for life involved a relinquishment of all rights to his earnings over and above said sum. Other circumstances, consisting of letters between the parties, or their authorized attorneys and agents, should also be admissible under the rule, both to establish the existence of the contract and the terms and provisions thereof.

It is interesting to note the following comment of the Court in *Estate of Patterson*, 46 Cal. App. 415, *supra*, in

respect to the validity and sufficiency, in law, of such an oral contract (*id.*, p. 420) :

“Nor have we been able to find any provision in our law requiring an agreement between a husband and wife whereby the one relinquishes to the other his or her inheritable interest in his or her estate shall, to be valid or of binding force, be in writing; and counsel for the appellant frankly say that, after considerable research, they have not succeeded in finding any California cases holding it to be the rule that such an engagement between husband and wife must be reduced to writing to be valid and enforceable.”

It may also be noted that, under California law, no consideration is necessary to support an agreement, written or oral, that one spouse relinquishes his or her rights to the earnings or personal property of the other. The mutual consent of the spouses is sufficient consideration for such a contract.

*Wren v. Wren*, 100 Cal. 276;

*Kaltschmidt v. Weber*, 145 Cal. 596;

*Helvering v. Hickman* (9 Cir.), 70 F. 2d 985.

*Cf.*:

*Doxsee Co. v. All Persons*, 3 Cal. 2d 609.

To the same effect see also the recent case of *Faust v. Faust*, 91 A. C. A., Vol. 3, p. 333 (204 P. 2d 906).

## Declarations of William C. Fields—Admissibility to Prove the Oral Agreement With Harriet V. Fields and Terms Thereof.

It must be conceded to be the general rule in California that self-serving declarations of a spouse are inadmissible upon an issue as to whether property is community or separate. Under this rule it has been held that the following specific declarations are incompetent: (1) Declaration in a will that property devised is the testator's; (2) like statements in the inventory and appraisement; (3) statements of wife, at time of purchase of property, that it was being bought for her separate property; and (4) allegations in husband's divorce complaint of non-existence of community property. (*3 Cal. Jur. Ten-Year Supp.*, pp. 572, 573, and cases cited.) There may also be others.

On the other hand, declarations against interest of a deceased spouse are admissible against those claiming under him, thus showing at least one exception to the general rule.

The declarations and statements of William C. Fields as to why he was currently paying \$60.00 per week to Mrs. Fields, and why such payments continued for nearly 40 years, should also constitute an exception to the general rule. Such declarations, considered in connection with the separation of the spouses and payments by him to her aggregating more than \$100,000.00 over a period of 40 years, would tend to show his intent in making such payments, and, in turn, such intent would disclose the existence of the contract requiring the making of said

payments. This should be sufficient to bring the alleged declarations of William C. Fields within the exceptions to the general rule excluding self-serving declarations of a decedent unless made against interest.

It is a settled rule of law in this State that when intent is a material element of a disputed fact the declarations of a decedent as to his intent in respect to such fact are admissible.

*Whitlow v. Durst*, 20 Cal. 2d 523;

*Hansen v. Bear Film Co. Inc.*, 28 Cal. 2d 154;

*Dineen v. Younger*, 57 Cal. App. 2d 200;

*Katz v. Enos*, 68 Cal. App. 2d 266.

### Conclusion.

Upon the foregoing facts and the authorities applicable thereto, we submit that no community property right ever existed in the earnings of William C. Fields while domiciled in California.

Respectfully submitted,

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By JOHN W. PRESTON,

*Attorneys for Appellants.*



No. 12204

IN THE

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

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WALTER FIELDS and ADEL C. SMITH,

*Appellants,*

*vs.*

HARRIET V. FIELDS,

*Appellee.*

---

BRIEF FOR APPELLEE, HARRIET V. FIELDS.

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JUN 3 6 1946

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**BRIEF FOR APPELLEE, HARRIET V. FIELDS.**

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**Jurisdiction.**

Plaintiff, a Pennsylvania corporation, brought an interpleader action. Defendants therein and appellants here, Walter Fields and Adel C. Smith, are residents of New Jersey. Defendant therein and appellee here, Harriet V. Fields, is a resident of California. By an appropriate order of the District Court these defendants were required to interplead. Federal jurisdiction rested upon the diversity of citizenship of the parties.

28 U. S. C. A. Sec. 41, Judicial Code.

### Nature of the Case.

W. C. Fields died in California December 25, 1946. On March 8, 1934, he purchased from plaintiff and paid for a single premium policy of life insurance upon his own life.

After his death plaintiff paid one-half of the death benefit under said policy to the appellants, Walter Fields and Adel C. Smith, whom the insured had designated the beneficiaries. Plaintiff then filed this interpleader action, deposited the remaining one-half of the death benefit in the registry, and trial was had between all defendants. The main issue at the trial was whether the insured had paid the insurance premium without his wife's consent from community property. The District Court made findings that he did. The portions thereof involved in this appeal are:

#### “V.

“It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields.

#### “VI.

“It is true that the payment of the sum of \$26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift of the community property of William Claude Fields and Harriet V. Fields.”

[Clk. Tr. 58.]

The pertinent statutes are Civil Code Section 163, Civil Code Section 164 and Civil Code Section 172.<sup>1</sup>

### Questions Involved in the Appeal.

Appellants concede "the sole question involved here is the character of the earnings of William C. Fields, from which this policy premium was paid."

The "sole question" may be amplified, "Was the premium on the life policy in question paid by William C. Fields from the community earnings of himself and Harriet V. Fields, his wife?"

Involved in the question is this sub-question:

Did appellee (wife of decedent) waive her rights in community property by a separation agreement made and fully executed in New York, or by a relinquishment of her community property rights made by her prior to the payment of the premium on the life policy in suit?

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<sup>1</sup>"§163. Separate property of the husband. All property owned by the husband before marriage, and that acquired afterwards by gift, bequest, devise, or descent, with the rents, issues, and profits thereof, is his separate property." (Enacted 1872.)

"§164. Property acquired after marriage. All other property acquired after marriage by either husband or wife, or both, including real property situated in this State and personal property wherever situated, heretofore or hereafter acquired while domiciled elsewhere, which would not have been the separate property of either if acquired while domiciled in this State, is community property; \* \* \*."

"§172. Management of community personal property. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or encumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community property, without the written consent of the wife." (Amendment 1917, p. 829.)

### Synopsis of Argument of Appellee.

There is ample evidence that decedent was domiciled in California at the time he earned the money paid as the insurance premium. It is doubtful whether there is any real conflict of evidence on this point, but if there is, the resolving of that conflict was exclusively the trial court's duty.

There is no evidence that appellee waived her rights in the community property of appellee and decedent, either by a separation agreement made and fully executed in New York, or otherwise.

If there is any evidence consistent with appellants' theory in this regard, it is in direct conflict with positive evidence which supports the findings of the District Court. The law is that the facts before this Court are those determined by the court below. The only possible way to attack the findings successfully is by showing that there was no substantial evidence to support the findings. This has not been and cannot be done.

This Court will not weigh conflicting evidence.<sup>2</sup>

In reliance upon this rule we do not here reargue the comparative weight of the evidence nor attempt to gauge

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<sup>2</sup>(From Rule 52A.) "Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witness."

"Under applicable statutes and repeated rulings here, the matter open for consideration upon the appeal was whether the findings of the trial Court supported its judgment. *To review the evidence, was beyond the competency of this Court.*" *State Farm Insurance v. Coughran*, 303 U. S. 485, at 487. "\* \* \* these findings are supported by evidence and hence are accepted by us as

the credibility of the witnesses. Appellee's argument will be submitted under the following titles:

I.

There Is Substantial Evidence Which Supports the Finding,

"It is true that the earnings and, consequently, the money paid for the annuity insurance contract were the community property of William Claude Fields and Harriet V. Fields." (Finding V.)

Our argument under that title also applies to the companion finding,

"It is true that the payment of the sum of \$26,500 for the insurance contract, the proceeds of which were to be paid to Walter Fields and Adel C. Smith, on March 8, 1934, was a gift from the community property of William Claude Fields and Harriet V. Fields." (Finding VI.)

II.

There Was No Agreement by Which Appellee Waived Her Community Property Rights.

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*correct.*" *Montgomery v. Lamberson*, 144 F. 2d 97 (C. C. A. 9, 1944). (Emphasis supplied.)

"We have only to determine whether the finding of the trial court is clearly erroneous. The finding is not clearly erroneous if there is substantial evidence to support it. We consider only the evidence that supports the Court's finding. We do not weigh the evidence or resolve conflicts therein, or consider here the credibility of the witnesses." *Fox River Corp. v. U. S.*, 165 F. 2d 639 (C. C. A. 7, 1948).

See also *Cherry-Burrell Co. v. Thatcher*, 107 F. 2d 65, at 69 (C. C. A. 9, 1939); *Gates v. General Casualty*, 120 F. 2d 925 (C. C. A. 9, 1941); *Augustine v. Bowles*, 149 F. 2d 93 (C. C. A. 9, 1945).

I.

**It Is True That the Earnings and, Consequently, the Money Paid for the Annuity Insurance Contract Were the Community Property of William Claude Fields and Harriet V. Fields.**

Appellants, at page 4 of their brief concede that there was a conflict in the evidence upon the subject of decedent's domicile.

It was stipulated that decedent was physically present in California at most if not at all times between April, 1931 and the date of his death, December 25, 1946. [Rep. Tr. 15.]

Appellee and decedent intermarried during 1900 in California. [Rep. Tr. 5.] Thereafter they traveled abroad. A child was born to them in 1904. About 1907 decedent abandoned appellee. [Rep. Tr. 6.] Decedent was an actor and traveled considerably. He reopened an old bank account in California April 19, 1931. The insurance premium in question was paid therefrom. [Rep. Tr. 27-28.] Decedent worked in California for a motion picture producer, beginning September 19, 1931. [Rep. Tr. 31.] He worked in California for another motion picture producer for the year 1932 continuously through the year 1936. [Rep. Tr. 36.] (There is no dispute that the premium was paid March 8, 1934.)

During 1931 he went to a real estate broker in North Hollywood [Rep. Tr. 80] and leased a furnished house in North Hollywood for one year. He overstayed the lease term for about six months. [Rep. Tr. 80.] He told the broker he had a desire to build a house, and looked at vacant residential property. [Rep. Tr. 81.]

In 1933 he appeared at a voting place in North Hollywood. [Rep. Tr. 83.] The landlord of the premises was present in a room adjacent to the room used for voting. [Rep. Tr. 84.] He saw decedent in the reception room enter the place where voting was being done while voting was in progress. [Rep. Tr. 85.] On that occasion the witness asked decedent to sign his autograph book. Decedent did so. [Rep. Tr. 86.] The entry was undated but immediately followed the autograph of another person which bore the date June 6, 1933. [Rep. Tr. 87.]

A member of the election board which functioned at that address saw decedent cast his ballot at that place. She had been on the election board since 1930 and knows that the ballot was cast toward the beginning of her tenure. [Rep. Tr. 92-96.] (A municipal election was held June 6, 1933.)

Decedent was appointed a Special Deputy Sheriff of Los Angeles County. In connection with his application papers, he answered certain questions over his signature. The application, dated September 1, 1934, contained the query, "Are you now a registered voter?" His answer was "Yes." [Rep. Tr. 97-98.] The statement was under oath. It also contained a Van Nuys, California, address as the residence of decedent. [Rep. Tr. 98-99.] Upon said application a sheriff's deputy badge was issued decedent. [Rep. Tr. 98.]

Of this evidence, the District Court said, in *Penn Mutual v. Fields*, 81 Fed. Supp. 54, at page 59, commenting as follows:

“\* \* \* As no one may vote in California without registering, after acquiring a legal domicile, and, as the presumption of legality attaches to the act of

every person, it must be assumed that W. C. Fields complied with the law and registered as a condition precedent to voting. \* \* \* But the facts just alluded to prove registration. This, under California law, implies an intention to reside permanently."

In *Toff v. Goodman*, 41 Cal. App. 2d 771, it was said:

"Of all the formal acts to be scrutinized in ascertaining a person's domicile, undoubtedly the act of registering and voting is the most important, and while not necessarily conclusive, it is usually most convincing and persuasive."

In 1932 decedent wrote to a New York bank as follows:

"Find key to my safe deposit box 131. Will you kindly seal the contents of the box in an envelope and send it to me registered mail or American Express. I will discontinue the use of the box as I am almost permanently settled here in California." [Rep. Tr. 105, Ex. Q.]

He opened a bank account in Hollywood during June, 1927. [Rep. Tr. 107, Ex. B.]

His earnings thereafter were traced into the account, and into the full payment of the premium on the policy in litigation. [Rep. Tr. 107-111 and 57-72, Ex. A and A 1; Rep. Tr. 48-55, Exs. J, K, L, E, F, G 1, 2, 3, 4, 5; Rep. Tr. 29-40.]

In 1927 decedent joined the Automobile Club of California and gave a North Hollywood address. He kept the membership in good standing throughout the rest of his

life. [Rep. Tr. 40.] He was a member of the Masquers Club in Hollywood, from 1931 to 1937. He gave a local address in his application. [Rep. Tr. 42.] The membership of the Club is divided into "residence" and "non-residence." Decedent held a resident membership. [Rep. Tr. 41.]

He applied for a Class "A" membership in the Screen Actors' Guild November 13, 1933. [Rep. Tr. 45.]

On June 4, 1933, he resigned from the New York Athletic Club. In the letter of resignation he said:

"Will you please accept my resignation and send me a bill for my indebtedness to date. My reason for resigning is that *I have taken up my residence in California and intend to remain here.*" (Emphasis supplied.) [Ex. P.]

Appellants relied heavily upon the fact that decedent's Federal income tax returns during the period showed his address as "Waterford Works, New Jersey." This creates no conflict for the law did not require the use of a domiciliary address on such returns until 1937.<sup>3</sup> Commencing in that year decedent gave his California address in said returns.

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<sup>3</sup>*In re Gilbert's Estate*, 15 A. 2d 111 (a New Jersey case), was one in which a like declaration of address in a tax return was urged as evidence of domicile. The Court pointed out that until the year 1937, it was not necessary under the Income Tax law to give one's actual address in a tax return and that as the only requirement was that an address to which mail could be sent the taxpayer, *no inference of domicile could arise from the giving of an address in a tax return.* This comment is at page 113 of the reported decision.

His actions show that he was acquainted with the rule set forth in *Gilbert's Estate*, 15 A. 2d 111, because when he came to distinguish between a mail address and domicile, he classified the Waterford Works entry as a permanent mail address and his relation to California as domicile.

In a petition, sworn to on August 22, 1939, filed before the United States Board of Tax Appeals, involving taxes for the years 1933, 1934, 1935 and 1936, and asking a re-examination of a deficiency assessed on June 10, 1939, W. C. Fields claimed domicile in California for the years 1933 and 1934. This sworn statement read:

“During the period involved in this appeal, *petitioner was domiciled in California, but maintained as a permanent mail address, 'R. F. D. #1, Waterford Works, New Jersey.'* During the year 1933 and until October, 1934, he rented a home located at 9950 Toluca Lake Avenue, North Hollywood, California, which was used both as an office and a residence. In October, 1934, he rented a house at 4704 White Oaks Avenue, Encino, California, which, likewise, was used during the ensuing two years both as an office and a residence. During this entire period and for many years prior thereto, he was separated from and not living with his wife, Hattie Fields.” (Emphasis added.)

This verified statement is not a casual claim of domicile, but one buttressed with facts showing occupancy of premises in California, for residential and business purposes, under long leaseholds, with an explanatory refer-

ence to the separation from appellee, Harriet V. Fields. The abandonment of the defense based on such claim does not wipe out the assertion as an admission against the present contention made on behalf of the decedent. *Domicile is acquired by "residence in fact, coupled with the purpose to make the place or residence one's home."* (*State of Texas v. State of Florida*, 306 U. S. 398.)

*From a combination of the residence in fact and the intent, there springs a condition or status known as Domicile. One's acquired domicile is retained until a new domicile is acquired.* (*De Young v. De Young*, 27 Cal. 2d 521.)

The foregoing is part of the evidence of California domicile in the critical period. We have not exhausted it. Appellants recognize its sufficiency by this statement in their brief, "We, on this appeal realize that this Court would probably not disturb this finding of the trial Court." (Opening Brief 4.)

The pertinent evidence is carefully analyzed in the Opinion of the District Court which is reported in 81 Fed. Supp. 54-62.

It follows that decedent's earnings, which were transmuted into an insurance benefit were community property unless the wife had entered into a valid agreement with decedent to the contrary.

II.

**There Was No Agreement by Which the Wife Waived Her Community Property Rights.**

In addition to arguing that decedent was not domiciled in California during the pertinent years, appellants tried their case in the District Court on the theory that appellee had made an agreement with decedent. That asserted, but non-existent, agreement supposedly bartered away her right in the community property.

The findings are otherwise.

Appellants' position is that there was a conflict in the evidence. They ask this Court to reperform the exclusive function of the trial court and apply the tests of credibility; weigh the conflicting statements, and determine where the preponderance of evidence lies. Such a contention misconceives the respective duties of trial and appellate courts. If we consider their shifted contention to be that there is not any conflict, it is made in the face of the affirmative testimony of appellee who testified that there never was an agreement between her and decedent. The evidence, therefore, is against appellants.

Testimony which supports the District Court in this regard is summarized thus:

The marriage remained intact. [Rep. Tr. 26, lines 3-25.] There was no property settlement agreement. [Rep. Tr. 217.] The wife took what decedent gave her for support. This was sometimes as little as \$25.00 per week. [Rep. Tr. 217.] For almost three years it was \$75.00 per week. [Rep. Tr. 218.] In 1933 he provided her with \$50.00 per week. [Rep. Tr. 218.] Then he increased it to \$60.00. [Rep. Tr. 218.] She supported the child of the marriage from

these monies. [Rep. Tr. 219.] At one time he gave her "\$25.00 a week, and then \$30.00 another time, and then \$35.00, and then he cut (her) down again, and then it was \$40 and then \$60.00. [Rep. Tr. 221.] \* \* \* " "There was no arrangement. He just sent it to me." [Rep. Tr. 221.]

Appellants urged a number of letters upon the Court. Appellee was questioned about them. They were examined by the Court. Appellants thought so little of them that but few were put in evidence. On the motion to reopen the case, more letters were produced and appellee examined concerning them.

Counsel requested and was granted permission to file a purported digest of the letters. It is now contended that this digest was received in evidence. This is not true.<sup>1</sup> The record shows that it was filed and treated as a memorandum. It was not offered in evidence. It would be clearly inadmissible as evidence for the letters themselves were available and the witness actually questioned about them. The District Court saw them and, in its Supplemental Opinion, the Trial Judge said at 81 Fed. Supp. 54:

"\* \* \* The statements in the widow's letters relating to receipts of moneys over a period of years (from 1914 to 1944), which are summarized in the digest of letters filed with the motions and as to which she was examined orally at the hearing, *are nothing*

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<sup>1</sup>Referring to the letters digested, the Court said: "Two of these are already in evidence."

Referring to the extract of correspondence, the Court said: "It may be filed." [Rep. Tr. 7, proceedings November 22, 1948.] This is the same language which was used on the same page with respect to the filing of a memorandum of authorities. There was no offer in evidence. The purported "extract of the correspondence between the parties" was not given an exhibit number.

*more than acknowledgments of receipts of various sums of money.* Their tone is, at times, sarcastic and the answering letters of the deceased, to which the digest refers, are similar in spirit. On the whole, they are of the same type as the letters which were before the court at the trial of the case. *They show, only, as did her testimony at the trial, that the wife, at various times, took, for her support, the amounts which the deceased, in his lifetime, gave her, increasing them or reducing them as he willed, she at times protesting, at others acquiescing.* THEY DO NOT TEND TO PROVE AN AGREEMENT TO ACCEPT THE WEEKLY PAYMENTS IN LIEU OF HER WIDOW'S RIGHT TO CLAIM PERSONAL PROPERTY FROM FIELDS' ESTATE.” (Emphasis supplied.)

A concession was made in the following colloquy in open court:

“Mr. Herron: Mrs. Fields is here in the court-room today. *She tells me that she never did enter into any property settlement agreement* and she does not have such an agreement in her possession.

Mr. Preston: How about the contract executed at the hospital?

Mr. Herron: *And there was no contract executed at the hospital.* She is here and available as a witness.

Mr. Preston: *Your word is good.*” (Emphasis supplied.)

Pursuit of the search for an agreement dissipated the case and left it barren, but counsel's imagination had been fixed. He read the letters. From the language of simple letters of a considerate and needy wife to her husband, non-existent property settlement agreements are imagined. With a show of laborious profundity, these imaginations are unsuccessfully scanned to produce the terms of some firm agreement.

At the trial appellee testified that there was never any understanding as to what her support would be. [Rep. Tr. 9.] They did not have an agreement. [Rep. Tr. 9.]

On the hearing of the motion to reopen, appellee testified that "There never was any agreement." [Rep. Tr. 32—Nov. 22nd.] "The weekly remittance was what he allowed me at that time. He changed. He went up and down later on." [Rep. Tr. 33—Nov. 22nd.] "I would have to take what was given me." [Rep. Tr. 33—Nov. 22nd.] At one time he cut her to \$50.00; and wrote "prospects are more effulgent. You are not going to suffer very long until you are back on \$75.00 again." [Rep. Tr. 35—Nov. 22nd.] He never restored her to \$75.00 per week. [Rep. Tr. 36—Nov. 22nd.] Before he died he cut her to \$40.00 per week. [Rep. Tr. 37—Nov. 22nd.]

From 1933 to November, 1946, the weekly allowance was \$60.00 a week. She protested and as always he made excuses, exaggerations, untruths and denials. [Rep. Tr. 37—Nov. 22nd.] She "didn't know when he was going to cut me because there was no stipulated agreement at any time and he cut me and raised me as he wanted to." [Rep. Tr. 38—Nov. 22nd.] There was no promise to support her. He just did support her "in a small way." [Rep. Tr. 38—Nov. 22nd.] When he left home and they quit living together he did not say anything about supporting her. He just kept on giving her \$25.00 or \$30.00 or \$35.00 and then down to \$25.00 again." [Rep. Tr. 38—Nov. 22nd.]

The word "agreement" appears only once in the extensive correspondence used by appellants' counsel in his extended examination. [Rep. Tr. 11, line 20; Rep. Tr. 45—Nov. 22nd.] *That one use of the word was in a letter written by decedent to appellee. She did not answer it.*

[Rep. Tr. 40—Nov. 22nd.] “I never answered his letter because it was so small and cheap. \* \* \* He waited for my answer and I never answered him.” Concerning the money decedent sent her, she “would from time to time write him and beg him for more, and sometimes \* \* \* get it, but more often not.” [Rep. Tr. 45—Nov. 22nd.]

Appellants, at the hearing on the motion (through counsel) stated this point to be:

“My point is that the law is that there could not be any acquisition of property rights in California, even though he moved here, *when he was supporting her and paying what she accepted as support.*” [Rep. Tr. 48—Nov. 22nd.]

It is apparent that appellants did not produce even a *prima facie* case that appellee waived her rights by the terms of any agreement. However, as against the bare contention that she did so, she has produced her sworn denial that there was ever any definite understanding.

This denial, tested by and fully explained in extensive cross-examination both at the trial and hearing on the motion, to reopen resulted in submission of the question upon a record which shows mere argument on one side, opposed to evidence on the other. The Court accepted the evidence. Even had the total absence of any evidence of an agreement been remedied, the wife would not be bound to such a contract because when husband and wife contract, the husband must regard the fact that he is a fiduciary.

“The relations between husband and wife are declared to be confidential and all transactions between them respecting property are made subject to the same rules that control transactions between a trustee and his *cestui que trust.*”

*Jackson v. Jackson*, 94 Cal. 446.

Property settlements between husband and wife are:

“\* \* \* subject ‘to the general rules which control the actions of persons occupying the confidential relations with each other, as defined by the title on trusts.’”

*Norris v. Norris*, 50 Cal. App. 2d 726, at 733.

The title on trusts in the Civil Code provides in Section 2228:

“\* \* \* In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary, and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.”

No proof was offered that he obeyed the rule. Counsel contends that the alleged agreement was entered into in New York. (Op. Br. p. 9.)

New York law is not different in this respect from the familiar California rules. See *In Matter of Bryczynski*, 81 N. Y. S. 2d 61. The Court dealt with a case wherein a husband seeking to limit his wife's share in his estate, had asked her to execute a waiver of her right to certain corporate stock. Prentice-Hall summarizes the holding:

“*Full disclosure of all the facts would seem to be necessary prerequisite of a valid waiver. But full disclosure itself may not be enough if a wife inexperienced in business affairs and faced with a complicated settlement cannot evaluate the facts disclosed. In such a case, there should be present on her behalf a lawyer or other qualified representative who can advise her and otherwise protect her interests.*” (Emphasis supplied.)

There is no evidence at all that meets these tests. Appellants have entirely failed to show that there was full disclosure of all the facts.

Despite the inability of counsel to state the full terms of the alleged agreement, it is his contention that one of its provisions was the waiver by the widow of all interest in decedent's earnings. Such a waiver, if actually made, would have been one under which decedent would have gained a very substantial advantage.

In *White v. Warren*, 120 Cal. 322, it was said:

“All transactions between husband and wife, by which one obtains *any advantage* from the other, are presumed to be entered into by the latter without consideration and under undue influence. \* \* \*. ”  
(Emphasis supplied.)

In *Gaines v. Calif. Trust Co.*, 48 Cal. App. 2d 709, this language appears:

“\* \* \* the agreement was drafted at the direction of the deceased and executed by the widow *at his instigation* \* \* \* *without any disclosure by him to her* of the then value and character of his estate or of the rights which she was called upon to surrender by the agreement. Accepting the agreement in the belief that the deceased was dealing honestly with her, she was justified in resting in that belief, and was not called upon then or thereafter to make independent inquiry . . . *it was the duty of the defendant to overcome the statutory presumption of lack of sufficient consideration and the exercise of undue influence.*” (Emphasis supplied.)

Decedent was the fiduciary who allegedly obtained the advantage in the supposed agreement. It was appellants' burden to show that the circumstances of making the agreement were fair and in all respects met the requirements of law. The evidence is destitute of any such suggestion. It was appellants' burden. They did not attempt to carry it. The widow never had legal advice.

There is no suggestion in the record that the widow took counsel at any time, on any phase of her relations with decedent. Counsel contends that the alleged agreement was entered into in New York. The law of New York in this respect is stated in *Wolf v. Wolf*, 34 Atl. 152 (N. J.). After observing that the laws of New York and New Jersey are the same in this field, the Court said:

“Taking up the special defense, the first question presented for determination is whether the separation agreement in itself constitutes a defense to this suit . . . it does not, for a number of reasons. For one thing it was executed by complainant without independent advice.”

The failure to provide the wife with independent legal advice *in re* the agreement was also a ground of reversal in *Matassa v. Matassa*, 87 A. C. A. 276.

There Is No Showing of a Specific Term of the Alleged Agreement Whereby Any of the Widow's Rights Are Specifically Waived.

*In re Griffith's Will*, 3 N. Y. S. 2d 926, at 927, the law is stated this way:

“\* \* \* ‘the agreement between the parties cannot be regarded as a waiver of any of their legal rights beyond the express terms thereof,’ *Jardine v. O'Hare*, 66 Misc. 33, 34, 122 N. Y. S. 463, 464.

“This rule has been approved, in effect, by our Court of Appeals (*Matter of Burridge's Estate*, 261 N. Y. 225, 229, 185 N. E. 81), where it cites *Girard v. Girard*, 29 N. M. 189, 221 P. 801, 804, 35 A. L. R. 1493. The official syllabus of the decision last cited states:

“In the construction of contracts, where it is sought to deprive either husband or wife of property rights growing out of the marital relation, courts will go no further than the language of the contract extends, and *will not deprive either spouse of such rights unless there is a clear and unmistakable intention to barter them away.*” (Emphasis supplied.)

Appellants have not offered any evidence of any clear and unmistakable intention on the part of the widow to barter away any of her rights.

With respect to a written agreement between husband and wife, it was said in *Matassa v. Matassa, supra*:

“It is not disputed that husband and wife may by appropriate agreement waive their respective inheritable rights in the estate of the other. It is equally well established, however, that the courts will not construe a property settlement between husband and wife as depriving the survivor of inheritance or other

rights growing out of the marital relation, except where there is a clear and unmistakable intention to barter away such rights. The agreement before us seems to be, as stated therein, ‘A property settlement between the parties, settling everything including community property.’ It also contains a mutual release of ‘alimony and any and all money demands that one could make against the other of any kind whatsoever.’ *There is no release in terms by either one* of claims upon the future acquisition of the other, nor, in terms, any release by either one upon the estate of the other in case of death. \* \* \* In *Jones v. Lamond*, 118 Cal. 499, 502, 50 P. 766, 767, 62 Am. St. Rep. 251, it is said: ‘*We do not think the courts should come to the aid of these contracts so as to deprive either the husband or wife of the property rights growing out of the marriage relation, except where there is a clear and unmistakable intention to barter away such rights.*’’ (Emphasis supplied.)

The law is set out in *In re Dow's Estate*, 91 A. C. A. 501:

“As said in *Re Estate of Gould*, 181 Cal. 11, 14, 183 P. 146, 147: ‘An examination of the cases wherein it has been held that the wife had waived her statutory rights as widow reveals the fact that in each case the words used clearly imported an intention to surrender the very right afterwards claimed.’ \* \* \*.”

The District Court, in considering the evidence, applied the above law. See *Penn Mutual v. Fields*, 81 Fed. Supp. 54, at 62:

“Much less do they (the letters) disclose any understanding that they were to continue during the lifetime of the widow. In brief, they fail to comply with

the essential requirements of such contracts as set forth in the very cases relied on by the movants. See especially, the language of the court in *Re Burridge's Estate*, 1933, 261 N. Y. 225, 185 N. E. 81, at page 82.

“As succinctly put elsewhere: ‘*To constitute a postnuptial settlement, the act creating it must be clear and unequivocal.*’ 41 C. J. S., Husband and wife, §89, page 562. (Emphasis added.) \* \* \*.”

### Conclusion.

It is respectfully submitted that the findings of the District Court are sustained by the evidence and that the judgment should be affirmed.

Respectfully submitted,

G. ALLEN BISBEE,  
WENDELL DAVIS,

By G. ALLEN BISBEE,

*Attorneys for Appellee.*

No. 12204

IN THE

**United States Court of Appeals  
FOR THE NINTH CIRCUIT**

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WALTER FIELDS and ADEL C. SMITH,

*Appellants,*

*vs.*

HARRIET V. FIELDS,

*Appellee.*

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**APPELLANTS' REPLY BRIEF.**

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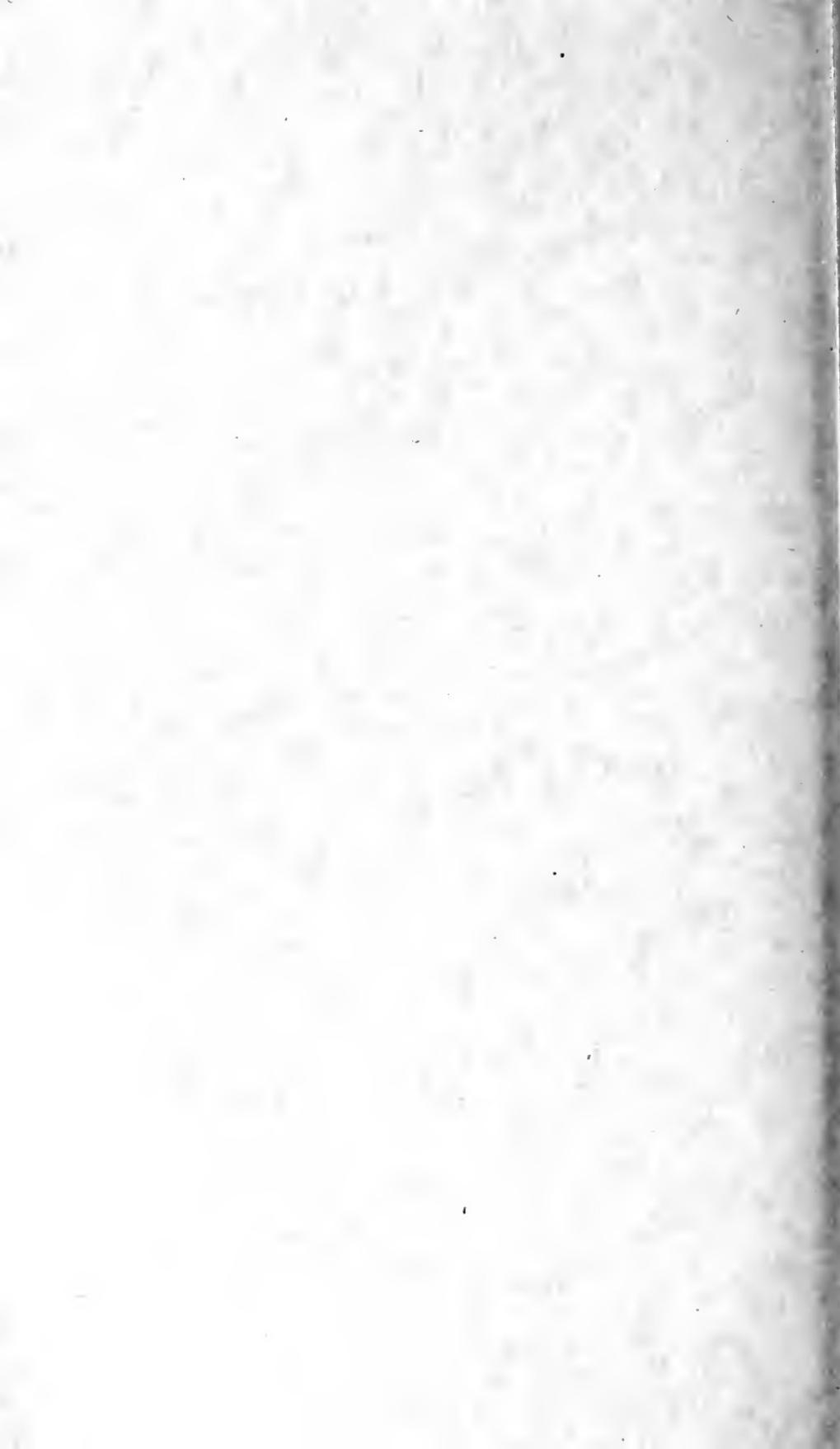
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**APPELLANTS' REPLY BRIEF.**

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**Introduction.**

Counsel for appellees misconceive the controlling question on this appeal. The question is not one of waiver of community property right, but on the contrary is one where we contend no community property right would or could arise. The spouses separated in New York, a common law state, in the year 1907. No community property could arise at this point, it being a common law state. For more than 25 years thereafter Harriet V. Fields lived in New York and W. C. Fields lived in New York and Pennsylvania. No community property right could arise during these years. The only claim she had or could have during any of that period was the right of support.

The spouses in 1907 agreed and thereafter continued to agree as to the manner in which he should discharge his obligation of support to her. This agreement continued from the date of its inception to the date of his death in 1946. This being true, no community property right could arise. It is, therefore, not a case of waiver of an existing right, but is a case where the law of contract as well as the law of domicile prevents the arising of any community property claim. The community property right is one that vests and exists during coverture. It is not a right of succession. Such rights accrue on the death of a decedent and not before. Harriet V. Fields may have the rights of a widow in the estate of her deceased husband, but that is the extent of her claim. The right of succession does not generate a community property claim. Her rights are as a widow in his separate estate and not otherwise.

The Court below failed to observe this distinction and thereby fell into serious error. Counsel for appellee quote from his written opinion at pages 13-14 of their brief. This very quotation reveals error in the Court's thinking. Of the showing made in this record and found in the appendix to this brief the Court below said:

“\* \* \* The statements in the widow's letters relating to receipts of moneys over a period of years (from 1914 to 1944), which are summarized in the digest of letters filed with the motions and as to which she was examined orally at the hearing, *are nothing more than acknowledgment of receipts of various sums of money.* Their tone is, at times, sarcastic and the answering letters of the deceased, to which the digest refers, are similar in spirit. On the whole, they are

of the same type as the letters which were before the court at the trial of the case. *They show, only, as did her testimony at the trial, that the wife, at various times, took, for her support, the amounts which the deceased, in his lifetime, gave her, increasing them or reducing them as he willed, she at times protesting, at other acquiescing.* THEY DO NOT TEND TO PROVE AN AGREEMENT TO ACCEPT THE WEEKLY PAYMENTS IN LIEU OF HER WIDOW'S RIGHT TO CLAIM PERSONAL PROPERTY FROM FIELD'S ESTATE."

That she under New York law would be entitled to a widow's share in his personal property and likewise under California law is not a disputed question here. But these are rights in his estate in the nature of succession rights based on the premise that the property in question in which she seeks recognition was and is decedent's separate estate, and not community property. Thus the court below failed to recognize the basic fact that under New York law no community property could exist.

The agreement between the spouses having been fully performed by him keeps this contract alive as long as he performs it. Admittedly he performed it until the day of his death. This agreement and its full performance is a barrier that cannot be hurdled so as to create community property. This is true because the Fourteenth Amendment would prevent any such action by the courts or Legislature of California. Therefore, the only question in this case is, Did W. C. Fields have an understanding or arrangement or agreement with Harriet V. Fields as to the manner in which he was to discharge his obligation of support to her?

### Evidence of the Agreement.

Evidence of the agreement was ignored by the Court below presumably because it was not a comprehensive settlement of all community property rights. But when the arrangement was made no property had been accumulated by either of them and little or no income was being earned by him. The duty to support was all the obligation he had to her when the separation occurred. The payment for support was at all times from the day of separation to the date of his death a matter of mutual understanding and agreement between them. For the convenience of the Court the main part of the evidence is set up in Appendices A, B and C of this brief. How the Court below could say that there was no agreement as to the amount she would accept as support is beyond our understanding.

This agreement measured his full duty to her and satisfied her claim to his future earnings. She did not lose her right of succession as a widow it is true, but she did lose any right to claim community property rights during the marriage and prior to the death of the decedent.

### Conclusion.

Counsel nowhere met the contention made by appellant. They discuss the question of waiver of community property right, but they do not discuss the contention that no community property right ever arose. The New York case, *In re Burridge's Estate*, 261 N. Y. 225, 185 N. E. 81 (Op. Br. p. 15), recognizes the character of agreements here shown and by implication at least holds that the

widow in such case has the right only given by New York law in the separate estate of her decedent husband. The Court in that case said:

"The parties here have not only agreed to live apart, but have determined the manner in which the husband shall meet his obligation to support his wife, and in return the wife has accepted the stipulated provision for her support in lieu of 'all other claim and provision for her support' as well as in lieu of her dower right. . . . An agreement of a wife that she shall accept in lieu of other provision for her support a sum fixed by agreement, to be paid while both parties live and the husband's obligation to support continues, is fairly open to the construction that the wife still intends to retain such rights against the husband's estate after his death as the law has conferred upon her."

It is only a right in his estate that is left to her in a case like the one before the Court.

The right of succession may remain, but a community property right cannot exist.

We submit that the judgment in this case should be reversed because the insurance premium was paid from the separate estate of the decedent in which the wife had no interest.

Respectfully submitted,

JOHN W. PRESTON,

JOHN W. PRESTON, JR.,

By JOHN W. PRESTON,

*Attorneys for Appellants.*







## APPENDIX A.

### Exhibit 33.

[Rep. Tr. p. 228.]

“655 Funchel Rd.  
Bel-Air Cal.  
June 27, 38

“Dear Hattie:—

“Further re. our conversation of several days ago. Is this your understanding and agreement. You wish me to allow you seventy dollars per week for a period of, say ten or twelve weeks. During the stay of Claudes intended bride when your household expenses will naturally increase. Then you agree to accept Fifty dollars per week for a like period immediately following, after which we return to the sixty dollars per week arrangement again. Or if you prefer you can have the extra Ten dollars per week for the ten or twelve weeks in a lump sum. I want to help you, and I know neither of us want a misunderstanding.

“Drop me a line here and when I return from the Springs in a few days I'll arrange with the bank to make the change.

“I hope yourself and Claude are well. My best wishes to you both.

CLAUDE.”

## APPENDIX B.

[Rep. Tr. Supp. pp. 22-46.]

Q. Now, Mrs. Field, have you reviewed these photostats of the correspondence that took place between you and Mr. Fields over the years? A. Yes, over a lifetime.

Q. Now, isn't it true that for the first period of your separation that you had a certain allowance each week?

A. There was no separation ever.

Q. All right. What do you call it then?

The Court: After he left you.

The Witness: He left to go on the road. He left New York to go on the road.

The Court: What he means by "separation" is that you did not live as husband and wife?

The Witness: We didn't live under the same roof.

Q. By Mr. Preston: What is the date you fixed when you ceased to live together as husband and wife? A. I can't remember.

Q. Just the year, please. A. I can't remember.

Q. Don't you know about what year it was? A. No, our child—

The Court: Didn't you tell me it was sometime after the baby was born? I think you told me that.

The Witness: Yes, sir. He was about—I was trying to think—

The Court: He was three or four years old?

The Witness: The child was about three or three and a half years old.

Mr. Preston: I think she said five and a half.

Q. By Mr. Preston: Didn't you fix it as 1907? A. He went on the road then.

The Court: Whatever took place between you took place in 1907, whatever you call it, a separation or his going away. That took place and—

The Witness: He came in and out from the road.

Q. By Mr. Preston: Can't you tell us a little more definitely what date you would say you ceased to live together as man and wife? A. When Claude was about three and a half years old.

Q. That would make it about what year? He was born in 1904? A. Yes, sir.

Q. About 1907? A. Yes, sir.

The Court: That would be 1907.

Q. By Mr. Preston: Now, in one of these letters that you say you have seen, there is a statement under date of December 28th, 1914:

"The arrears in payments are all righted" by the payment of \$100.00.

What did you mean by that?

Mr. Herron: Just a moment. We think the witness should be shown the letter.

The Witness: I can answer that.

The Court: That is all right.

Mr. Preston: If she doesn't remember she may say so.

The Witness: I didn't say I couldn't remember. Mr. Fields would send me four weeks in advance at \$25.00 a week and that is what the \$100.00 would have meant.

Q. By Mr. Preston: That is four weeks in advance? A. Yes, sir.

Q. You expected \$25.00 a week, did you not? A. I didn't know what to expect. That is all I was allowed to have from him.

Q. Answer my question: "The arrears are all righted." That means you expected \$25.00 a week, does it not? A. According to what he said—until he advanced me again.

Q. Now then, I believe you have already testified that he never said anything to you about a home in Philadelphia. A. When I asked for a home in Philadelphia he would say yes, and then he would send me something later, but it was always conversation. He never produced a home.

Q. Well, you wrote him a letter, did you not, holding the matter in abeyance, on January 4th, 1915, or January 20th, 1915? Do you remember anything about that after seeing the correspondence here? A. I waited for years for an answer to that.

Q. Answer my question. Did you write the letter that is referred to here under date of January 20th, 1915, postponing acceptance or rejection of the offer in Philadelphia? A. Yes.

Q. For a home? A. Yes, sir; because the child hadn't finished school yet and I didn't want to take him out of school for a home. Then we were living in Brooklyn and I wanted to go to New York to get a little apartment.

Q. Now, there is another letter here dated October 1, 1915, which acknowledged receipt: "The weekly money up to date," and asking for an additional \$100.00 to move into a small flat and states: "We won't annoy you any more for anything truly." Did you see that letter? A. Yes, I saw that.

Q. What does the "weekly money up to date" refer to? A. \$25.00 a week. And I couldn't have gone into a place and paid—

Q. I am not asking for voluntary answers.

Mr. Herron: You asked what it referred to.

The Witness: I haven't finished. You interrupted me always.

Q. By Mr. Preston: I asked what it referred to.  
A. Yes.

Q. Now, here is another letter on October 18th, 1915, which acknowledges receipt of—I can't tell whether it is fifty or thirty. A. I guess thirty.

Mr. Herron: Fifty.

Mr. Preston: Fifty dollars on the \$100.00 requested above and refers to renting a little flat. Do you remember getting that \$50.00? A. That \$50.00 was to be used over a period of two weeks, but I never got the \$100.00.

Q. On October 20th, 1915, you acknowledged receipt of \$50.00 "to date." Do you remember that? A. "To date"? Yes, because he would often fall back and I would have to remind him that he was still in arrears.

Q. Now, on May 23rd, 1917, you wrote him: "Our weekly remittance these last few weeks" not paid. Did you? A. You confuse me all the time.

The Court: Answer the question, Madam. He merely asked you if you wrote the letter. You will answer that yes or no and then if you want to explain it I will let you explain it. Answer the questions. You wrote a letter and he wants to know what you referred to.

Q. By Mr. Preston: What did you refer to? A. May I have that again, please?

Q. By Mr. Preston: The quotation I have is: "Our weekly remittance these last few weeks not paid." A. No. He would run behind very often and very often confuse me.

The Court: Are you referring to the amount?

Mr. Preston: How much did you expect as late as May 23rd, 1917?

The Witness: I was getting \$25.00 then.

Q. By Mr. Preston: On February 7th, 1922, you wrote: "Our weekly remittance received to date."

Mr. Herron: Do you have the letter?

Mr. Preston: I think I can find it.

Mr. Herron: I would like to show it to the witness and she will probably know what you are talking about.

Q. By Mr. Preston: Do you recall that letter, a letter of February 7th, 1922: "Our weekly remittance received to date"? A. Yes. Mr. Fields always expected me to answer when I got the money order from him.

Q. Well, you accepted the money in lieu of support, did you not? A. I had to.

Q. Well, answer my question. Did you? A. Yes, I did. I had to.

Q. On the 20th day of February, 1922, you were supposed to have written in substance this: "Received a check for \$70.00 which went right to the rent and the rest for part on the furniture bill," and you asked for a larger weekly remittance than \$30.00. Do you remember that? A. I can't say that I remember that one letter, but I wrote him many letters.

Q. What is your answer again?

Mr. Herron: She said, "I can't remember that letter, but I wrote him many letters."

The Witness: Of the same type for years and years.

Q. By Mr. Preston: Then, on November 17th, 1925, there is a letter that reads this way: "Thanks for the check for \$60.00. That leaves you \$20.00 in arrears from last week." What does that mean? A. Sometimes he wouldn't send me the full amount.

Q. In 1925 were you supposed to get \$60.00 a week? A. I can't remember that.

Q. Well, anyway the \$60.00 left you \$20.00 in arrears. Can you explain what the arrears referred to? A. I told you sometimes he would not send me the full amount that he promised and would make up for it at another time.

Q. Isn't it a fact that you knew at all times how much he had promised to give you? A. No, because he would sometimes send more and sometimes less.

Q. All right. Then explain this letter of February 5th, 1926. This is a letter set up in the affidavit: "Thank you for the check for \$65.00 this week. Undoubtedly you made a mistake in sending \$5.00 too much. However, it will keep until next week." What do you refer to there? A. Because he was very capable of trickery—very often.

Q. What? A. Mr. Fields was very capable of trickery very often and would try to see whether I would give him the money back—the \$5.00 back or when he was in arrears.

Q. What did you mean when you said it was \$5.00 too much? A. He must have sent \$5.00 too much.

Q. Too much for what? A. Too much of the money that he was sending me every week.

Q. Don't you understand that that \$60.00 was what you were supposed to receive?

Mr. Herron: What date is this, Judge?

Mr. Preston: February 5th, 1926.

The Witness: No, I was supposed to receive a great deal more because I never could meet my expenses with the child.

Q. By Mr. Preston: Now, this reads: "Thank you for the check for \$65.00 this week. Undoubtedly you made a mistake in sending \$5.00 too much. However, it will keep until next week." Now, doesn't that mean to you that you were expecting \$60.00 a week? A. Yes.

Q. And that he sent you \$5.00 too much? A. Yes. And previous to that, he was in arrears \$20.00.

Q. All right. Was this a time when you were supposed to get \$60.00 a week or more? A. I can't remember.

Q. Can't remember? A. No.

Q. Well, isn't it true that he made an agreement with you or had an understanding with you or told you, at least, that he was going to send you \$60.00 a week in the year 1925? A. There never was any agreement.

Q. I am not asking information about an agreement. I am asking you what he told you. A. He told me lots of things. I can't remember that one letter. There was a letter every week.

Q. Do you remember the Harriman Bank? A. Yes.

Q. Do you remember when he made arrangements with that bank for you? A. I don't remember, but I know of the time when the bank went in the disaster.

Q. What was the arrangement there? A. (No answer.)

Q. How much were you to get? A. I just don't remember.

Q. Wasn't it \$75.00 a week? A. Yes, I guess it was at that time.

Q. What—how long did it go at \$75.00 a week? A. Less than three years.

Q. And then what was it changed to? A. He went down to \$50.00, and I said I couldn't manage on that, so he raised me to \$60.00.

Q. Now, Mrs. Fields, on October 14th, 1926, you wrote: "Our weekly remittance received for which we thank you." How much was that? A. I don't remember that one day that I said that. I said that in numerous letters.

Q. What did you refer to when you said, "Weekly remittance received"? A. The weekly remittance was what he allowed me at that time. He changed. He went up and down later on.

Q. He did then allow you a certain amount which he changed up and down, is that right? A. That is the only way he could do.

Q. Answer my question yes or no. A. Yes.

Q. Now, on June 4th, 1927, you said this: "Check for \$75.00—." "Acknowledge receipt of check for \$75.00 and note your arrangement with Harriman Bank for future payments, which is agreeable to me and acceptable." Did you say that? A. I don't remember that one letter. I had to agree to anything in order to keep my rent paid.

Q. The question is, did you tell him that it was agreeable to you and acceptable to get \$75.00 a week from the Harriman Bank?

Mr. Herron: And the witness answered she didn't remember that letter. Now, if you want to show it to her why don't you show it to her?

Mr. Preston: Have you got it?

Mr. Bisbee: We have never seen the letter.

The Court: Go ahead. I think she has answered the question.

Mr. Preston: I didn't want to take up too much time to show her.

Q. By Mr. Preston: If that is one of your letters could you tell what that meant—what that would mean?

A. I would have to take what was given me.

Q. Doesn't that mean it was agreeable to you and acceptable to you to get \$75.00 a week? A. When I was paying for furniture and had rent to pay it had to be agreeable.

Q. There is nothing said about furniture or rent in there, is there? A. Well, we never went into detail in every letter. There was an understanding that I was paying for furniture and a piano for the child, and I had to have rent and he had to go to school.

Q. Didn't Mr. Fields write you a letter on the 29th day of March, 1932, and say: "Could you manage on \$50.00 a week until things look up?" Do you recall that? A. Yes.

Q. Well, did he send you \$50.00 a week instead of seventy-five after that? A. Yes, that is what he did.

Q. And later on, didn't he make that up? A. Yes, he made it up later.

Q. He made that up? A. Yes, I believe he did. When was that?

Q. Well, did you get this letter from him on May 5th, 1932: "Within the week I will make your allowance \$50.00 per week until things look up a bit," and "prospects are more effulgent," and "You are not going to suffer very long until you are back on \$75.00 again." Do you remember that letter? A. Yes, I do.

Q. Do you remember that? A. Yes, I believe I do.

Q. Don't you gather from that, Mrs. Fields, that the understanding with you was that you were to have \$75.00 a week? A. Yes, sir.

Q. And that he had cut you down to \$50.00, as you call it, and that he was telling you that he would put it back to \$75.00. A. Yes, but he never did.

Q. Well, that \$75.00 was agreeable to you, was it not? A. It had to be. I had no other source of money.

Q. Well, then, in 1932, on the 19th of May, the bank changed the checks from \$75.00 to \$50.00, isn't that right? A. Yes, sir.

Q. Well, didn't he make in about May of 1933, an arrangement with the Guarantee Trust Company to pay you so much a week? A. Yes.

Q. How much a week was that? A. Well, after the Harriman Bank went into disaster he changed to the other bank and then when I told him I couldn't get along on \$50.00 he then changed it to \$60.00, as I told you.

Q. And how many years did that go on? A. Until about 1946.

Q. The date of his death? A. Yes, sir.

Q. Well now, when he died you were still under the \$60.00 a week regulation or whatever we want to call it, is that right? A. No. He reduced me to \$40.00.

Q. When? A. I told you.

Q. November of 1946? A. Yes.

Q. Well, up to November 1946, from 1933 to that date, it was \$60.00 a week, is that right? A. Yes.

Q. And you accepted it? A. I had to.

Q. Did you protest? A. I protested, yes.

Q. You protested? What did you get? A. The same as always—excuses—exaggerations, untruths, denials.

Q. I see a letter here dated December 9th, 1934, in which you wrote: "Won't you please keep your promise and send me the rest of the cut you made?" What did you have reference to there? A. What was that date, please?

Q. The date? A. Yes.

Q. December 9th, 1934. A. 1934. I just meant the same as I did for years and years. I didn't know when he was going to cut me because there was no stipulated agreement in any way at any time and he cut me and he raised me as he wanted to.

Q. Didn't he promise to support you, Mrs. Fields? Didn't he promise to support you? A. He didn't promise. He just did in a small way.

Q. Didn't he tell you he was going to support you? A. He never said anything about support.

Q. Didn't you have a discussion with him at all in which he told you he was going to support you? A. He

never said anything about it. He knew he had to in a small way.

Q. When he left did he say anything about supporting you? A. Left when?

Q. Well, when he left the home—when you quit living together as man and wife? A. No. I just kept on getting \$25.00 or \$30.00 or \$35.00, and then down to \$25.00 again.

Q. Just kept on sending it all the time. A. He just kept on supporting his wife and child.

Q. Was there ever a time between the time you quit living together as man and wife to the time he died in which you didn't collect your support? A. Sometimes he let it run over into a month.

Q. But you would get it eventually? A. Eventually; yes, sir.

Q. He supported you during that entire time? A. Yes, sir.

Q. And you accepted it? A. I had to.

Q. Well, cut out the "had to." Did you accept it? A. Yes, because it came to the house in a letter in the form of a check.

Q. And when he wrote you on June 27th, 1938, and that letter is already in evidence here, in regard to the \$10.00 for the entertainment of the bride-to-be of your son, you saw that letter today and read it again, did you? A. No, I didn't see it today.

Q. Well, it reads as follows: "Is this your understanding and agreement you wish me to allow you \$70.00 per week for a period of say 10 or 12 weeks, during the stay of Claude's intended bride when your household

expenses will naturally increase? Then you agree to accept \$50.00 per week for a like period immediately following, after which we return to the \$60.00 per week arrangement again." Didn't you make that proposition to Mr. Fields? A. Yes, but I never answered his letter because it was so small and cheap.

Q. You misunderstand my question.

The Court: That was the letter about which she was examined in the trial.

Mr. Preston: But not on this phase of it, your Honor. It is the same letter, all right.

Q. By Mr. Preston: You made that proposition to him, did you not, that you would take \$10.00—if he would give you \$10.00 more than \$60.00 you would take \$10.00 less than \$60.00 to make it up? A. If I asked him for any additional—

Q. Please answer my question. Did you do that? Didn't you make that offer to him? A. Yes, sir.

Q. And didn't he agree to do it? A. He waited for my answer and I never answered him.

Q. You never answered that letter at all? A. No.

Q. You made him the proposition and he wrote you a letter? A. Yes, sir.

Q. And you never answered it? A. I didn't answer it.

Q. Well now, there is one more letter dated January 7th, 1944, from the Hotel Empire, New York City. You wrote him as follows, did you not: "I was surprised when they informed me at the bank that you were anxious, I know, for there is nothing in this world you would not do for me and there is nothing in this world I would not do for you, so we have gone through life doing nothing for

each other." Do you recall that? A. Yes, sir; I thought he would laugh at that.

Q. And on January 13th, 1944, six days later, he wrote you in substance as follows: "If you were surprised can you imagine my surprise when I read your letter and you said we had gone through life doing nothing for each other. Sixty smackers a week, year in and year out, for forty years, \$124,800 you consider nothing. Heigh-ho-Lackaday; surprises never cease." Did he write you that? A. Yes.

Q. Was there any more correspondence after that? A. Yes. I sent him a few cards and told him I had gone to Philadelphia to see family friends.

Q. Now, you were living in New York, were you not, from the time—1907, we will call it,—the time you ceased to live together as man and wife, until you left to come to California in 1936? A. Yes, sir.

Q. Well now, Mr. Fields, where did he claim his home to be during the time you ceased to live together as man and wife?

Mr. Herron: That doesn't have anything to do with the motion presently pending.

Mr. Preston: It shows the place—

The Court: You are not going into the question of domicile at the present time?

Mr. Preston: It is not for that purpose. It is only for the purpose of showing there was an arrangement under the jurisdiction of New York.

The Court: All right.

Q. By Mr. Preston: Where did Mr. Fields live at the time you separated? A. He lived in his home in California.

Q. 1907? A. Oh, in 1907?

Q. When you separated? A. I thought you said 1944.

The Court: No, he is going back to 1907, the time you separated.

Q. By Mr. Preston: At the time you separated? A. He jumped around so.

Q. What? A. I said "You jump around so."

The Court: He is going back to the beginning.

Q. By Mr. Preston: Go back to the time you separated in 1907, when Claude, Jr. was a child. A. Yes.

Q. Where did you live and where did he live? A. In 1907 he was in New York, I believe, at that time.

Q. How long did he stay in New York in your opinion? A. According to the contracts that he had a few weeks here and there around the city and in Brooklyn. Then he would go back on the road again to Canada and Buffalo.

Q. Well, you have stated in your papers in New York that he left for California in about 1928, is that right?

A. Yes, I believe it was 1928.

Q. At all times previous to 1928 then he was a resident of New York, is that your conclusion or your opinion?

A. I don't know what he called his home.

Mr. Bisbee: I suggest that is an improper question—what her opinion is.

The Court: She was not a resident of California, anyway, I think the rule in regard to what constitutes an agreement between husband and wife is the same whether

you go by the law of New York or otherwise. I notice in your memorandum you even cite a case of mine.

Mr. Preston: Yes, I did. That is all I want to ask this witness.

Q. By Mr. Herron: Mrs. Fields, with respect to a letter written March 29th, 1932, do you remember having written Mr. Fields in part as follows: "In answer to your question, could we manage on \$50.00 a week until things look up," did you reply: "Yes, I will try to do what I can to help you in your trouble. Need I tell you what it will mean in sacrifices to me? In view of your statement concerning your financial affairs just now I haven't very much choice either way, have I? It is really too unfortunate that you have these repeated attacks of gripe." Then did you also say: "Out of the many thousands you make weekly you call \$75.00 to me the lion's share. Certainly I will do what I can and as long as I can on \$50.00 a week to help you out in your trouble. This \$50.00 will have to cover rent, gas, electricity, telephone, ice, and the milk bill, food and clothing for two, until Claude is located and the inevitable incidentals." Did you so write?

A. Yes, sir.

Mr. Preston: What date was that?

Mr. Herron: That is one of your letters which you disposed of with a line, but not those lines.

The Court: All right.

Q. By Mr. Herron: Now, Mrs. Fields, it is a fact, isn't it, that during all this period of time you accepted

what you got? If Mr. Fields wrote you that he couldn't give you \$70.00 you would take \$50.00, wouldn't you?  
A. I had to.

Q. And then you would from time to time write him and beg him for more, and sometimes you would get it, but more often you would not, is that right? A. Positively.

Q. And that was all there was to it? A. Yes, sir.

Mr. Herron: That is all.

Mr. Preston: May it please the court, do you want to ask her any questions?

The Court: No.

## APPENDIX C.

[Clk. Tr. pp. 68-74.]

In the District Court of the United States, in and for the Southern District of California, Central Division.

The Penn Mutual Life Insurance Company, a corporation, Complainant, vs. Walter Fields, *et al.*, Defendants. No. 7854-Y Civil.

### DIGEST OF THE LETTERS WRITTEN BY MR. & MRS. FIELDS TO EACH OTHER.

The letters herein digested begin on December 28, 1914 and end December 12, 1945. There are a few letters and telegrams that bear no date. The letters are referred to herein by their respective numbers.

1.

Shows that on December 28, 1914, Mrs. Fields stated "the arrears (in payments) are all righted" by the payment of \$100.00.

2.

Shows offer on January 4, 1915, of Mr. Fields to supply a home to the wife and their son in Philadelphia.

3.

On January 20, 1915, Mrs. Fields wrote, postponing acceptance or action on offer of Philadelphia home.

5.

Mr. Fields agreed to pay railroad fares of wife and son to Cleveland. Again offers to get a home for them.

6.

Mrs. Fields, on October 1, 1913, acknowledges receipt of "the weekly money up to date. Asks for additional

\$100 to move into small flat" and states, "we won't annoy you any more for *anything truly.*"

7.

Mrs. Fields, on October 18, 1915, acknowledges receipt of \$50.00 on the \$100.00 requested in 6, *supra*, and again refers to renting a little flat.

8.

On October 20, 1915, Mrs. Fields acknowledges receipt of \$50.00 "to date."

10.

On July 29, 1916, she asked "your help of a little extra money each week to go to Atlantic City" to avoid some infectious disease prevalent in New York City.

11.

On May 23, 1917 she reminded him that "our weekly remittance these last few weeks" not paid.

14.

On February 7, 1922, she wrote "our weekly remittance received to date." Asked for additional money for rent, etc.

15.

On February 20, 1922, she wrote she had received "cheque" and "\$70 went right to the rent, the rest for part on furniture bill." Asks "for a larger weekly remittance than \$30."

17.

On November 17, 1925, she thanks him "for the cheque for \$60.00 (sixty) that leaves you twenty dollars in arrears from last week."

No.

On February 5, 1926, she wrote "Thank you for the cheque for \$65.00 (sixty five dollars) this week—, undoubtedly you made a mistake in sending five dollars too much,—however it will keep until next week."

18.

On October 14, 1926, she wrote "Our weekly remittance received, for which we thank you."

19.

On June 4, 1927, she acknowledged receipt of "cheque for seventy five dollars (\$75.00) and note your arrangement with Harriman Bank for future payments, which is agreeable to me, and acceptable."

20.

On December 4, 1928, she renewed request to make weekly payments larger, because of his increased earnings.

21.

On January 16, 1929, thanked him for New Years present. Explained poor state of health and renewed request for increased payments.

23.

On March 29, 1932, she referred to his question, "could we manage on fifty dollars per week until things look up." She reminded him of the sacrifices that would entail, increased expenses, etc.

24.

On May 5, 1932, he wrote that "within the week I will make your allowance fifty dollars per week until things look up a bit," that "prospects are more effulgent," and "you are not going to suffer very long until you are back on seventy-five again."

25.

On May 19, 1932, letter from Harriman Bank changing weekly check to her from \$75.00 to \$50.00.

28.

On March 28, 1933, she informed him she had heard from Guaranty Trust Co. that payment of \$50 per week would be made to her. Spoke of four payments not made by Harriman Bank, and of being destitute.

31.

On April 6, 1933, Hattie acknowledged receipt of his "cheque for two hundred, covering four weeks. Most of outstanding bills of the past four weeks are attended to."

34.

On June 19, 1934, she wrote, renewing "question of a life time, to give us a home."

35.

On December 9, 1934 she wrote "won't you please keep your promise and send me the rest of the cut you made."

(All of her foregoing letters were written from New York.)

36.

On August 9, 1935, she wrote from New Commodore Hotel, Los Angeles, about his illness.

39.

On February 15, 1936 W. C. Fields wrote Claude Fields, "Have just stopped story that for thirty-six years I have unfailingly remitted money to your mother."

40.

On June 27, 1938, he wrote her "Is this your understanding and agreement you wish me to allow you seventy dollars per week for a period of say ten or twelve weeks. During the stay of Claude's intended bride when your household expenses will naturally increase. Then you agree to accept fifty dollars per week for a like period immediately following, after which we return to the sixty dollars per week arrangement again."

41.

Lloyd Wright letter of February 24, 1938, re taxes.

43.

On March 29, 1939, she wrote in reference to his present of a coat and dress.

45.

Letter, April 8, 1939, from Alan A. Gray re taxes, and referring to separation agreement.

49.

July 8, 1942, she wrote asking "a favor of you" that he pay her railroad fare to New York and return for Claude's wedding.

50.

January 7, 1944, she wrote from Hotel Empire, New York City, "I was surprised, when they informed me at

the bank, that you had telegraphed my whereabouts. But you were anxious I know, for there is nothing in this world you would not do for me, and there is nothing in this world I would not do for you, so we have gone through life doing *nothing* for each other."

51.

To which he replied, on January 13, 1944, "If you were surprised, can you imagine my surprise when I read your letter and you said we had gone through life doing nothing for each other. Sixty smackers a week, year in and year out, for forty years (\$124,800.00)you consider nothing. Heigh-ho-lackaday, surprises never cease."

Respectfully submitted,

JOHN W. PRESTON

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By JOHN W. PRESTON

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